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THE PRINCIPLES

OF

THE HINDU LAW OF INHERITANCE

TOGETHER WITH

I.—A DESCRIPTION, AND AN INQUIRY INTO THE ORIGIN, OF THE *SRADDHA* CEREMONIES;

II.—AN ACCOUNT OF THE HISTORICAL DEVELOPMENT OF THE LAW OF SUCCESSION, FROM THE VEDIC PERIOD TO THE PRESENT TIME;

AND

III.—A DIGEST OF THE TEXT-LAW AND CASE-LAW BEARING ON THE SUBJECT OF INHERITANCE.

BY

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TAGORE LAW PROFESSOR;

LAW LECTURER AND PROFESSOR OF SANSKRIT, CANNING COLLEGE, LUCKNOW.

CALCUTTA:

THACKER, SPINK AND CO.,

Publishers to the Calcutta University.

BOMBAY: THACKER & Co., LIMITED. MADRAS: HIGGINBOTHAM & Co.

LONDON: W. THACKER & Co.

1882.

CALCUTTA:

PRINTED BY THACKER, SPINK AND CO.



CONTENTS.

LECTURE I.

Introduction.

Page

LECTURE II.

Origin and Growth of Ancestor-Worship.

LECTURE III.

NATURE OF SRADDHA RITES. PERSONS COMPETENT TO PERFORM THESE RITES

LECTURE IV.

SOURCES OF HINDU LAW.

LECTURE V.

PRINCIPLES OF SUCCESSION IN THE MIDDLE AGES.

LECTURE VI.

PRINCIPLES OF SUCCESSION IN THE MIDDLE AGES—(*continued*).

LECTURE VII.

THE MODERN SCHOOLS OF HINDU LAW.

LECTURE VIII.

MODERN TEXT-WRITERS.

LECTURE IX.

DEVELOPMENT OF THE PRINCIPLES OF SUCCESSION FROM THE ELEVENTH TO THE FIFTEENTH CENTURY.

LECTURE X.

Development of the Principles of Inheritance from the Sixteenth to the Eigthteenth Century.

LECTURE XI.

THE SUCCESSION OF AN ADOPTED SON.

LECTURE XIII.

ORDER OF SUCCESSION UNDER THE MITAKSHARA LAW.

I. Gotrajas.

LECTURE XIV.

Principles of Succession under the Dayabhaga Law.

I.

LECTURE XV.

PRINCIPLES OF SUCCESSION UNDER THE DAYABHAGA LAW.—(*continued.*)

II.

LECTURE XVI.

LAW OF SUCCESSION IN A DIVIDED FAMILY.

ERRATA.

Page 46, line 21, *for* 'remot,' *read* 'remote.'
,, 217, ,, 22, ,, 'or,' ,, 'nor.'
,, 308, ,, 16, ,, 'falure,' ,, 'failure.'
,, 356, ,, 9, ,, 'his,' ,, 'their.'
,, 383, ,, 27, ,, 'so far,' ,, 'so far as.'
,, 394, ,, 11, ,, 'cotton,' ,, 'balanced.'
,, 458, *note*, ,, 'P. C. Tagore,' *read* 'Colebrooke.'
,, 557, line 8, *after* 'in,' *insert* 'the.'
,, 696, last line, *for* 'rights,' *read* 'right.'
,, 699, line 18, ,, 's_3,' ,, 's_2.'
,, 703, ,, 6 (note), *omit* 'mentioned above.'
,, 779, ,, 13, ,, 'by them.'
,, 784, ,, 19, ,, 'by him.'
,, 805, ,, 17, *for* 'have,' *read* 'has.'
,, 805, ,, 20, ,, 'his,' ,, 'the author's.'
,, 943, ,, 24, ,, 'issues,' ,, 'issue.'

LECTURE I.

INTRODUCTION.

Scope of the work — Obsequial offerings and their legal bearing — Kamya *Sraddha* — Ancestor-worship: Its general prevalence and various symbolizations—Its development among the Roman Catholics — In the form of feeding the spirits on All Souls' day — Soul-cakes—Their identity with the *pindas* — Severance of the legal and religious aspects of obsequial offerings — Illustrated by *frankalmoigne* land tenure in Saxon England — The principle of which underlies the tenure of land among the Hindus — Lands originally held for spiritual services — The laws relating to funeral expenses in England and Scotland are traceable to the connection between spiritual service and rights of inheritance — This connection is still recognized by the Hindus — The Greek view of sepulchral duties — Roman *sacra* — Provision for obsequial expenses indispensable in Rome — Analogous Hindu custom—With the Hindus the right of inheritance is co-extensive with the obligation of performing obsequies — Failing competent heir, this obligation extends even to the king — Funeral rites — In Greece — Obolus — A similar Hindu custom mentioned in the Yayur-Veda — Grecian rites described — *Choai*, or tomb-offerings — *Genesia*, or birthday offerings — *Nekusia*, or mortuary offerings — Roman ceremonies — *Silicernium*, or funeral feast — Public feast on the anniversary of death — Worship of the manes of the departed — Persia — Peculiarity of the Parsee custom — Exposure of dead bodies — Five sacrifices — The last of these has affinity with Hindu *Sraddha* — Chinese funerals—Their descriptions — Their pre-eminent importance — Death rendered happy with the assurance of posthumous ceremonies — Medhurst's account — Egyptian ceremonies — Mummies — *Post mortem* trial — The Hindu form of ancestor-worship quite distinct from the Egyptian — Hebrews — They had nothing akin to the Hindu mode of worship — Ancestor-worship an Aryan usage — Inferred from the similarity of ceremonies performed by different nations.

THE subject of the present course of lectures is— "The Nature and Origin of the S'raddha Ceremonies, and the Gradual Development of the Principles of Inheritance in the different Schools of Hindu Law." Scope of the work.

LECTURE I.

Obsequial offerings and their legal bearing.

The first part of the subject does not at first sight seem to be very attractive. Death and mourning, obsequial offerings, and funeral ceremonies are seldom calculated to excite pleasant feelings. To the lawyer, however, they have a melancholy interest of their own. It will be our object to show that this interest is founded on reason, and that obsequial offerings and funeral rites are intimately connected with one of the most important branches of Hindu law.

Kamya sraddha.

It is usual with devout Hindus to perform, before undertaking any important task, some mystic rites in honor of their departed ancestors. These rites are known by the rather cacophonic name of *kámya s'raddha.* The spirits of the dead are solemnly invoked to bless the work which is about to be undertaken, and to give strength to the performers to accomplish the object desired. Let us follow this time-honored practice, and begin our lectures with ancestor-worship—the keystone, as it were, of the Hindu Law of Inheritance.

Ancestor-worship.

Great importance has been attached by almost every nation to the obsequies of the dead, dictated in the first instance by love and affection, sanctioned afterwards by religious conviction, and moulded into various forms by stubborn social necessity. Funeral customs are associated with a wide variety of sentiments, from gentle and rational sorrow, up to deification of the departed; and we owe to these customs some of the most magnificent fruits of architectural

genius and labour. The Pyramids of Egypt, the Castle of St. Angelo, and the Taj of Agra speak of undying affection, gratitude, and veneration for those we loved and revered. The temples dedicated to patron saints also bear testimony to the religious care and reverence with which the hallowed memories of the dead were preserved in every part of the world. These tombs and temples are now the honored heirlooms of humanity, and form an essential part of the necessary conditions of civilized existence. They are the visible representations of the inner sentiments of love and respect for those who have left us never to return. Are these not symbols of ancestor-worship? Strictly speaking, they are not so. These grand and magnificent buildings were not in every instance erected by descendants to perpetuate the memory of their beloved ancestors; but the central elements of ancestor-worship can be clearly discerned in the feelings which dictated the erection of these standing monuments of affectionate remembrance.

Its general prevalence,

Abundant evidence can be gathered from historical records to show that ancestor-worship has existed from a very remote period. It existed among the Greeks and the Romans, the ancient Persians and the Egyptians, as well as among the Teutons and the Celts; and it is practised to this day by the modern Chinese and by all pious Hindus. Even the repressive influence of Christianity has not been

and various symbolizations.

LECTURE I. — able to stamp it out in civilized Europe. What are the offerings of flowers upon the graves of friends and relatives and parents, but an indication of the sentiments which originated the solemn institution of ancestor-worship. The decorations of graves and tombstones also point in the same direction. The portraits of dead parents are calculated to excite feelings akin to those which are associated with the worship of ancestors. The dead parents are often figured in the minds as real beings who exercise a beneficial influence over the conduct of their living descendants. The dying injunctions of these parents acquire all the force of sacred obligations, and the shades of the departed are fancied as following their descendants wherever they go, and however they may be engaged in the various occupations of life. The dead ancestors are considered as guardian angels, who warn their descendants of dangers to come, and rescue them from perils in which they are involved. The manes among Protestants do not receive divine honors, it is true, but the sentiments with which they are regarded are allied in every respect to those connected with ancestor-worship. The souls of the departed are with them actual spirits, who take a deep interest in all the transactions in which their descendants may be concerned. In short, this belief is nothing more or less than that which is at the root of ancestor-worship.[1]

[1] Spencer's Principles of Sociology.

This is the feeling in Protestant Europe. It takes a much more developed form among Roman Catholics. The chapels over the dead, and the prayers *to* the dead, are only different shapes of ancestor-worship. When a dead ancestor is thought not to be in purgatory, prayers, we are told, are offered up *to* them for intercession. A Hindu, or a Chinese, does nothing more. The chapels over the dead constantly remind the worshippers of the souls of the departed for whose benefit they have been erected. "If erecting a chapel to the virgin," says Herbert Spencer, "is an act of worship, then the sentiment of worship cannot be wholly absent if the erected chapel is over a dead parent." The sanctified remains are there rousing religious sentiments closely related to ancestor-worship.[1]

LECTURE I. — Its development among the Roman Catholics.

But this is not all. The custom of feeding the spirits, both annually and at other times, affords an indisputable proof of the existence of ancestor-worship among the Catholics of Europe. We refer to the feasts held on All Souls' day in various parts of Europe, both among Teutons and Celts. The object of the festival, it is stated, is to alleviate the sufferings of the souls in purgatory, by prayers and almsgiving. The origin of this festival is thus related: "A pilgrim returning from the Holy Land, was compelled by a storm to land on a rocky island somewhere between Sicily and Thessalonica. Here

In the form of feeding the spirits on All Souls' day.

[1] Spencer's Principles of Sociology.

LECTURE I. he found a hermit, who told him that, among the cliffs of the island, was situated the opening into the under-world through which huge flames ascended, and the groans and cries of souls tormented by evil angels were audible. The hermit had also frequently heard the complaints and imprecations of the devils at the number of souls that were torn from them by the prayers and alms of the pious. The pilgrim acquainted his Abbot with the facts which had come to his knowledge, and the Abbot thereupon appointed the day after 'All-Saints' to be kept in his monastery as an annual festival for 'All Souls.'" This observance is adopted by the whole Catholic world ; but the theological account of the origin of the festival cannot conceal the fact that the feast of All Souls, in which the spirits of the dead are annually fed, is a relic of an earlier institution, and is now incorporated with Christian rites, and is sanctioned by the canons of the Catholic church. We may remark by the way that the festival of All Souls corresponds to the *pitri pinda yajna* of the Hindus.

Soul-cakes. In some parts of the west of England, it is still the custom, we read, for the village children to go round to all their neighbours *souling*, as they call it, collecting small contributions, and singing the following verses :

Soul ! soul ! for a soul-cake ;
Pray good mistress, for a soul-cake.

One for Peter, two for Paul,
Three for them who made us all.
Soul! soul! for an apple or two;
If you have got no apples, pears will do.
Up with your kettle, and down with your pan;
Give me a good big one, and I'll be gone.

Their identity with the *pindas*.

We do not go beyond the limits of reason, if we affirm that the *soul-cakes* referred to in the verses quoted above are *pindas*, which are still presented by the Hindus to the souls of the deceased. The ceremonies attending the presentation of the soul-cakes have been discontinued by the edicts of the Christian church, but the original *pinda* remains to remind us of the original institution which was universally adopted by the Aryan world, and carried by the Aryan immigrants to different parts of the world from their common home in the plains of Central Asia.

Severance of the legal and religious aspects of obsequial offerings.

In Christian countries the legal obligation and the religious duty of performing the obsequies of deceased relatives have ceased to be blended. The point of development at which law breaks away from religion has been passed, but we are not quite prepared to admit that every trace of the intimate relation which once existed between them has entirely disappeared from the jurisprudence of modern Europe. We still find signs which lead us to suppose that at one time the connection was inseparable, and that it is only the spirit of utility, guided by reformed religious faith, which has loosened the bonds which once subsisted between the legal obligation and the

LECTURE I. — religious duty of celebrating the obsequial rites of deceased ancestors.

Illustrated by *frankalmoigne* land-tenure in Saxon England.

One of the land tenures in Saxon England was known by the name of *frankalmoigne*. It was a tenure by which a religious corporation held lands on condition of praying for the souls of the grantor and his heirs. "By the ancient common law of England, a man could not alienate lands which came to him by descent without the consent of his heir, but he might give a part to God in free alms." The condition, as we said above, on which lands were held in *frankalmoigne* of the superior lord was that masses and divine services should be said for the donor and his heirs, but no other particular service was insisted upon. It was an understood thing that divine service should be performed for the deceased; but if the tenant in *frankalmoigne* failed to comply with this condition, the lands could not be taken away from him. They were given to him and his heirs for ever. The tenure by divine service was also of this nature; the difference being that in the latter case the tenant was bound to render fealty, and the lord was entitled to distrain, in the event of failure to perform the service.

The principle of which underlies the tenure of land among the Hindus.

Among Hindus all immovable property may be said to be held in *frankalmoigne*. The Hindu heir, or the tenant in Indian *frankalmoigne*, is bound by law and religion to present soul-cakes to the relative from whom he inherits the pro-

LECTURE I. — perty. As in *frankalmoigne* lands could not be taken away from the donees once they were vested in them, so the Hindu heir cannot be deprived of the inherited property, even on failure of the original condition upon which it descended to him. Once the title is created, it is indubitable, and no subsequent act or omission of the heir can divest him of the property to which he is now lawfully entitled.

Lands originally held for spiritual services.

The tenure in *frankalmoigne* then furnishes a clear proof of the fact that there was a time when lands were held on condition of rendering spiritual services to the donor. This was not a feudal tenure; it might be called a spiritual tenure of land. Spiritual tenures are not the exception, but the rule in India.

The laws relating to funeral expenses in England and Scotland are traceable to the connection between spiritual service and rights of inheritance.

The law regulating funeral expenses in England and Scotland shows that the connection between the duty of performing the obsequies, and the right of inheriting the property of a deceased relative, has not yet been entirely severed. It does not, of course, exist in that vigor in which it is met with in India; but nevertheless connection does exist, and the heir is bound by law to comply with certain conditions which are inseparable from his tenure of the inherited property. "Funeral expenses are a privileged debt, allowed before all other debts and charges, both in England and in Scotland. If the parties primarily liable neglect the duty of giving decent burial to the dead, a stranger may do so, and claim reimbursement out of his effects, before all others having rights,

Lecture I.

whether heirs or executors." Reformed notions of religion and spiritual duty have changed the primitive ideas about spiritual benefits, and produced an order of things foreign to the religious Government of the ancient world.

This connection is still recognized by the Hindus.

But the central element found in the theory of spiritual benefits, which regulates the devolution of property among Hindus, forms an essential part of the law relating to funeral expenses in England and Scotland.

The Greek view of sepulchral duties.

"Sepulchral duties," says Grote, "were sacred beyond all others in the eyes of a Greek." The dead had, as it were, a legal and a moral claim to obsequial rites. If these were not rightly performed, the souls of the dead wandered disconsolate, and could not taste the joys of the Elysian abode. By one of the laws of Solon, children who were released from all other obligations to unworthy parents, were nevertheless bound to perform their funeral rites. Those who neglected to perform this last act of duty, were condemned to eternal infamy. It was a grave charge against the moral character of a man that he failed to celebrate the obsequies of his relatives. Children could be prosecuted for neglecting this solemn duty, just as they were liable to criminal prosecution, if they neglected to support their parents who were incapable of earning a livelihood. The first obligation of an heir was to perform the customary funeral rites. If no money was left, the relatives were still bound to

celebrate the obsequies. If they failed to do so, the Government could, after giving warning, cause the funeral rites to be duly performed, and then compel the nearest of kin to pay double the expenses. When a rich man died, his nearest relatives hastened to pay respect to his remains, probably to raise a presumption of their being the rightful heirs. The obsequial rites among the Greeks, as we will show, were held periodically, and the heirs were bound to duly perform them at the appointed times. The due performance of the ceremonies was an incident of property, and the claim of the dead upon their heirs was sanctioned by the law of the country.

Roman *sacra.*

Great care was taken by the civil law to make due provision for the performance of the *sacra* of the Romans. These *sacra* were sacrifices and ceremonies held in honor of deceased ancestors. They were family rites, which every member of the family was obliged to perform in honor of the dead. No adoption in the family could take place, unless proper arrangements were made for the celebration of the *sacra* of the family, from which the adoptive son was taken, and no testament was allowed to distribute an inheritance unless the different co-heirs agreed to share in due proportions the expenses of the *sacra* of the family.

Provision for obsequial expenses indispens-

It was the custom in Rome to reserve a certain sum of money for the obsequial rites of the deceased. If no such provision was made by the deceased himself

LECTURE I.

able in Rome.

during his lifetime, the duty of paying the expenses and of celebrating the rites devolved upon the heir, to whom the property was left; and in the event of his dying without a will, this duty devolved upon his relatives, according to their order of succession to the property.[1]

Analogous Hindu custom.

There does not seem to have been much difference int his respect between the Roman and the Hindu system. "He who inherits the property," says Vishnu, "shall also offer the funeral cake. A son must present this cake, even if he does not get any portion of his father's property." By the law of the Romans also a son was compelled to pay homage to his deceased father, in the shape of certain funeral ceremonies, even if he did not obtain any property from him. The Hindu system went further, and laid it down as an imperative rule, that the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. The devolution of property depends upon the competence to perform the obsequial rites of the deceased. They cannot be separated. He who is entitled to celebrate these rites, is also entitled to inherit the property; and he who gets the property must perform the funeral rites of the last owner. If there are no relatives who are legally competent to perform them, the law of succession does not apply, and the property escheats to the Crown. The king takes the property

With the Hindus the right of inheritance is co-extensive with the obligation of performing obsequies.

Failing competent heir, this obligation

[1] Smith's Greek and Roman Antiquities.

as an heir, and as such, is also bound to discharge all the obligations of an heir. He must cause the last rites to be performed for the deceased, and must also see that they are periodically celebrated on the appointed days. The "water" and "the cake" are essentially necessary for the lasting peace of the soul of the deceased, and he who inherits his property must perform ceremonies which would conduce to his spiritual welfare. Hindu law has thus inseparably connected the duty of presenting the "water" and "the cake" with the right of inheritance, and this makes it absolutely necessary that a clear conception should be gained of the *sraddha* rites which form the basis of the Hindu law of inheritance.

LECTURE I. — extends even to the king.

Before we come, however, to the description of the funeral ceremonies as they exist among the Hindus, let us take a rapid survey of funeral rites as they existed among the different nations of the ancient world.

Funeral rites.

We first come to the classic fields of ancient Greece.

In Greece.

The Greeks either buried or burnt their dead. It was common to anoint the body, to crown it with flowers, and then to layit on a bed of state, before performing the holy rites of cremation. On the third day after death, it was taken outside the town before sunrise by the friends of the deceased, and there those rites were performed, without the due performance of which the soul of the departed would

LECTURE I.

not be allowed to dwell with the blessed, and live at ease and in abundance among innocent pleasures in the fields of Elysium.

Obolus.

Before consigning the dead body to the purifying flames, an obolus was put into its mouth for Charon, and a honey-cake for Cerberus. All those who took part in these ceremonies were considered as polluted, and had to perform rites of purification before they could again be admitted into the temple of the gods.

A similar Hindu custom mentioned in the Yayur-Veda.

Putting the obolus into the mouth of the corpse, corresponded, it should be remarked, to the Hindu custom mentioned in the Yayur-Veda of placing a piece of gold in the open mouth of the deceased, with what object it is difficult to imagine. When a man undertakes a long journey, he supplies himself with ample funds to meet his travelling expenses. When the deceased was about to start upon a journey to that distant land, "from whose bourne no traveller returns," it was but natural for his affectionate relatives to provide for his comforts on the way, and as gold can command all the comforts we require, what could be more reasonable than to place a piece of gold in the hands of the traveller.

Grecian rites described.

To return from this digression. On the third day after death, the Greeks offered a sacrifice to the dead called *trita*. The other sacrifices[1] and ceremonies which followed the funeral were known as *trita*, *ennata*, *triakades*, *enagismata*, and *choai*. The principal sacri-

[1] Smith's Greek and Roman Antiquities.

fice to the dead was on the ninth day, called *ennata*. The mourning for the dead appears to have lasted till the thirteenth day after the funeral, on which day sacrifices were again offered. At Sparta the time of mourning was limited to eleven days. During the time of mourning it was considered indecorous for the relatives of the deceased to appear in public; they were accustomed to wear a black dress, and in ancient times cut off their hair as a sign of grief.

Choai, or tomb-offerings.

The tombs were preserved by the family to which they belonged with the greatest care, and were regarded as among the strongest ties which attached a man to his native land. On certain days the tombs were crowned with flowers, and offerings were made to the dead, consisting of garlands of flowers and various other things. The act of offering these presents was called *enagizein*, and the offerings themselves *enagismata*, or more commonly *choai*.

Genesia, or birthday offerings.

The *genesia*, we quote Dr. Smith, mentioned by Herodotus, appear to have consisted of offerings of the same kind which were presented on the anniversary of the birthday of the deceased. The *nekusia* were, probably, the offerings on the anniversary of the day of death, when meals were presented to the dead and burnt.

Nekusia, or mortuary offerings.

The Roman ceremonies were analogous.

Roman ceremonies.

Inhumation was practised in the earlier ages; but towards the close of the Republic, and during the first four centuries of the Empire, the body was

LECTURE I. usually consumed by fire and the ashes consigned to the tomb in an urn. When the whole was consumed, the glowing embers were extinguished with wine, the charred bones were collected, sprinkled first with wine, then with milk, dried with a linen cloth, mixed with costly perfumes, and enclosed in an urn, which was deposited in one of the niches arranged in regular rows in the interior of the family tomb.[1]

The preparation of the body for burial or cremation was performed by a hired body of men. The corpse was dressed in its best attire: if a magistrate, in official robes; and if he had, while alive, been crowned, then wearing the crown. In early times the burial took place at night, but in later times this was the practice only of the poor, who could not afford a funeral display. On the eighth day the body was carried to the grave in a stone coffin on a wooden, or in some cases a golden bier, amid music and lamentation, and sometimes mimic representations of the life and merits of the deceased by professional players. The sons of the deceased went with their heads veiled, and the women beat their breasts and lacerated their cheeks. When the body was burnt, oil, perfumes, ornaments, and everything supposed to be agreeable to the deceased were thrown into the fire. On returning from the funeral, friends were purified by sprinkling themselves with holy water, or stepping over a fire. There were days set apart

[1] Ramsay's Roman Antiquities.

for the purification of the family. The mourning and the solemnities connected with the dead lasted for nine days after the funeral; at the end of which time a sacrifice was performed called *novendiale;* and we also read that nine days after cremation a repast called *coena feralis* was placed beside the tomb, and of this the manes were supposed to partake.

A feast was given in honor of the dead, but it is uncertain on what day. It sometimes appears to have been given at the time of the funeral, sometimes on the *novendiale*, and sometimes later. The name of *silicernium* was given to this feast.

Silicernium, or funeral feast.

After the funeral of great men, there was, in addition to the feast for the friends of the deceased, a distribution of raw meat to the people, and sometimes a public banquet. Public feasts and funeral games were sometimes given on the anniversary of funerals. At all banquets in honor of the dead, the guests were dressed in white.

Public feast on the anniversary of death.

The Romans, like the Greeks, were accustomed to visit the tombs of their relatives at certain periods, and to offer them sacrifices and various gifts. The manes were regarded as gods, and were worshipped with divine honors. At certain seasons which were looked upon as sacred days, sacrifices were offered to the spirits of the departed. An annual festival, which belonged to all the manes in general, was celebrated on the 19th of February, under the name of *feralia* or *parentalia*, because it was the duty of children and

Worship of the manes of the departed.

LECTURE I.

heirs to offer sacrifices to the shades of their parents and benefactors.[1]

Persia.

Ancestor-worship existed in ancient Persia, and is practised to this day by the Parsees of Bombay. The Parsees are descendants of the ancient Persians, who were expelled from Persia by the Mahomedan conquerors. Their religion, says an eminent scholar as delivered in its original purity by their Prophet Zoroaster, and as propounded in the Zend-Avesta, is monotheistic, or perhaps rather pantheistic, in spite of its philosophical dualism, and in spite of its apparent worship of fire and the elements, regarded as visible representations of the deity. Its morality, we are told, is summed up in three precepts of two words each—"good thoughts," "good words," "good deeds;" of which the Parsee is constantly reminded by the triple coil of his white cotton girdle. In its origin the Parsee system is allied to that of the Hindu Aryans, as represented in the Veda, and has much in common with the more recent Brahmanism.

Peculiarity of the Parsee custom.

One notable peculiarity distinguishes Parseeism. Nothing similar to its funeral rites prevails among other nations. Before the Parsees remove the body from the house where the relatives are assembled, funeral prayers are recited, and the corpse is exposed to the gaze of a dog, regarded by the Parsees as a sacred animal. The dead bodies are not buried, but exposed

Exposure of dead bodies.

[1] Smith's Greek and Roman Antiquities, Classical Dictionary, Encyclopædia Britannica, Chambers's Encyclopædia, Tegg's Last Act, &c., &c.

on an iron grating in the *dakhmas*, or towers of silence, to the fowls of the air, to the dew, and to the sun, until the flesh has disappeared, and the bleaching bones fall through into a pit beneath, from which they are afterwards removed to a subterranean cavern. The mourners repeat certain *gathas*, and pray that the spirit of the deceased may be safely transported on the fourth day after death to its final resting-place.[1]

LECTURE I.

Five sacrifices.

The sacred books of the Parsees prescribe five sacrifices, which every faithful worshipper of fire is bound to perform. These are: the slaughtering of animals for public or private solemnities; prayers; the daruns sacrament, with its consecrated bread and wine, in honor of the founder of the law; the sacrifice of expiation, consisting either of flagellation, or gifts to the priest; and lastly, *the sacrifice for the souls of the dead.* The sacrifices for the dead resemble the *sraddhas* of the Hindus. On reading the prayers calling upon the spirits of deceased ancestors, we are struck by the resemblance they bear to the *Vaidic mantras* recited by Hindu priests on those solemn occasions when funeral oblations are presented to the souls of the dead. It is but natural that there should be greater resemblance between the Zoroastrian and the Vaidic ceremonies, than between the Hindu and the Greek funeral rites. The ancestors of the ancient Persians and those of the Vedic Aryans dwelt for a long time together, before a religious

The last of these has affinity with Hindu *sraddha*.

[1] Professor Monier Williams.

LECTURE I.

schism separated them from each other. They shared common beliefs and common traditions, and it is reasonable to expect that the two religious systems should have much in common. The Parsees have apparently the same respect for the spirits of the departed, who were also called *pitaras*, as the Hindus have for their ancestors. *Sraddhas* were as familiar to the ancient Persians as they are to the Hindus of the present day.

Chinese funerals.

It has been supposed that the Chinese and the Hindus are the only two nations of the present age which celebrate Sraddha ceremonies in honor of their departed ancestors. We have seen that the Parsees also perform ceremonies which are analogous to the Sraddha rites. The Chinese funeral sacrifices have many points in common with those prescribed by the Hindu S'astras. It is difficult to imagine from what sources the Chinese could have borrowed these rites. The Budhists show an aversion to these rites, and it was not possible, therefore, that the Budhist missionaries could have imported them from India. They must, therefore, have been of indigenous growth.

Their description.

"As soon as a Chinese has expired, some relation or friend immediately takes his coat, goes to the top of the house, and turning his face towards the north, calls as loudly as possible upon the soul of the deceased three times successively. After which, he folds up the coat and turns his face towards the south; and then unfolds his coat again, and spreads

Lecture I.

it over the deceased, there to remain three days untouched, in expectation that his soul will resume its former state.

Their pre-eminent importance

"There is no business in the life of a Chinese so important to him as his funeral; and no object of art or science in which he is so interested as his coffin. A wealthy man, we are told, will spend 1,000 crowns upon this piece of vanity; a poor man will give all he is worth; and a son is frequently known to sell himself for a slave, that he may purchase a rich coffin for his father."[1]

Death rendered happy with the assurance of posthumous ceremonies.

"The patriarchal system of life is dear to the heart of every Chinaman, and when his time comes to die, death loses to him half its terrors if he is assured that his sons will be present at his tomb to perform the customary rites, and to offer the prescribed sacrifices. It is the firm belief of every Chinaman that the peace of his soul entirely depends on the due celebration of these posthumous observances."

Medhurst's account.

The following curious particulars related by the eminent missionary Medhurst will be read with interest:—

"According to the precepts of Confucius, children are bound to sacrifice to their deceased ancestors; and at the anniversary of their parents' death, as well as at the feast of the tombs, all persons must present offerings to the manes of their progenitors.

"These sacrifices are not offered as an atonement or

[1] Tegg's Last Act.

LECTURE I. propitiation, but merely for the support of the departed individual. The ghosts are supposed to feed upon the provisions offered up, and, in consequence, forbear to annoy their descendants ; or, it may be, exert some influence in their favor. As the food, however, does not decrease in bulk after being feasted on by the spirits, the Chinese imagine that the flavour only is taken away, while the substance remains. Thus those who leave children and grandchildren are well provided for by their descendants; but alas! for those who happen to die without posterity. Deprived of all sustenance, they wander about in the invisible regions, cold, hungry, and destitute. The Budhists have grounded on this prevailing sentiment many superstitious services. They induce survivors to call in their aid at almost every funeral, that the souls of their deceased relatives may be released out of purgatory. They have also got up public services for the wretched ghosts who have no posterity to provide for them. This they put forth as an entirely benevolent undertaking, and a committee is appointed to collect the funds, and lay in the necessary provisions. On the day fixed for the ceremony, stages are erected, one for the priests, and the other for the provisions. Flags and lanterns are displayed near; gongs and drums beaten to give notice to the forlorn ghosts that a rich feast is provided for them ; and then the priests set to work to repeat their prayers, and move their fingers in a peculiar way, by which means they

believe the gates of hell are opened and the hungry ghosts come forth to receive the boon. Some of the spectators profess to be able to see through the open portals, and the scampering demons, pale and wan, with hair standing on end, and every rib discernible, hurrying up to the high table, and shouldering away the baskets of fruit and pots of rice, or whole hogs and goats, as the case may be, and returning with satisfied looks, as if they had enough to last them till the next anniversary. When the priests have gone through the service, the rabble come forward, and scramble for what the spirits have left."

Egyptian ceremonies.

The funeral ceremonies of ancient Egypt require only a passing notice: "When any of their relations died, the whole Egyptian family quitted their place of abode, and during sixty or seventy days, according to the rank or quality of the deceased, abstained from all the comforts of life, excepting such as were necessary to support nature."[1] It is worthy of notice that the embalming of the body and the judgment of the dead were peculiar to the Egyptian system. Bodies were embalmed to preserve them from decay, and placed in prominent positions in dwelling-houses, or entombed in stupendous structures called pyramids. The mummies were dressed in the habiliments of the living, and received marked respect from their descendants. They were guarded as sacred treasures; nay more, they were often wor-

Mummies.

[1] Burder.

LECTURE I.

shipped as embodiments of the spirits of the dead. For full twelve months the embalmed bodies were kept in the house, and feasts were held in their honor. After the year was over, they were taken out, and carried to the margin of a lake, where forty-two judges sat in solemn judgment upon the departed individual. The question to be decided was, whether the merits of the individual during his lifetime were such that his remains deserved the honors of burial. All persons who brought any accusations against the dead were patiently heard, and judgment was pronounced after deliberate consideration. There were wailing and lamentation if the judgment was unfavorable; but shouts of applause rent the sky if the judges thought that the remains were worthy of the honors of burial. The body was then carried over to the other side of the lake in a boat by a ferryman called Charon. All the legends about this distinguished personage that are related in Greek and Roman mythologies had probably their origin on the banks of the Nile.

Post mortem trial.

The Hindu form of ancestor-worship quite distinct from the Egyptian.

It is to be remarked that although the mummies were often treated in Egypt as idols are in Hindu households, they were not looked upon as gods, and no periodical sacrifices were offered to them. Ancestors were certainly worshipped, but *not* in such a form as in India, Greece, or Rome. The similarity between the Egyptian forms and those of India was but slight, and we have no hesitation in saying that

Sraddhas, at least in the form in which we have them in India, were utterly unknown in Egypt. It has been often thought that the social and religious systems of ancient Egypt and India had many points in common, and people have even gone so far as to say that the *Vedic Rishis* borrowed their religious tenets and social customs from the priests of Isis and Osiris. We need not enter into this vexed question at present. It is enough for our purpose to say that one of the most solemn of religious sacraments, the *Sraddhas* of the Hindus, was not sanctioned by the spiritual *regime* of Egypt. India and Egypt, in this instance at least, did not meet upon common ground, and assist each other in framing their social and religious laws. The care which was taken of the dead, plainly showed that the gratitude of the Egyptians to their deceased relations was immortal. "Children, by seeing the preserved bodies of their ancestors, recalled to mind those virtues for which the public had honored them; and were excited to a love of those laws which such excellent persons had left for their security." We thus see that ancestor-worship in Egypt took a shape quite distinct from that in vogue in India. Ancestor-worship did prevail in Egypt, but it was worship of a peculiar type, and we cannot institute any comparison between the Indian and the Egyptian modes of such worship.

Hebrews.

I have been often asked whether the Hindu *Sraddhas* had any counterpart in the Hebrew funeral

Lecture I.

They had nothing akin to the Hindu mode of worship.

ceremonies. We search in vain in the sacred books of the Hebrews for any indication of ancestor-worship in the same form in which we meet with it in India. Elaborate ceremonies were performed at the time of burial, but they were not of the same nature as those observed in India. The Hebrew books prescribed innumerable feasts and sacrifices, but none of them were like the *Sraddhas* of the Vaidic Aryans. There were burnt offerings, and peace offerings, and sin-offerings, but there were no obsequial offerings similar to those of the Hindus. The ceremonies performed in connection with the funeral honors paid to Joseph in Egypt merely followed Egyptian observances, and were not Jewish in their nature. Even these ceremonies had very little in common with the Indian rites. Whatever, therefore, might be said to the contrary, and however plausible the arguments against the theory, we are strongly disposed to think that ancestor-worship was an Aryan institution, and its outward forms were of a peculiarly Aryan character. Ancestor-worship must have arisen from the natural instinct of man, and must have been developed in different forms according to the varied circumstances of the countries in which it originated. That ancestor-worship did exist in some shape or other among all the nations of the earth cannot admit of a doubt. What we simply contend for is, that the form in which we meet with it in Hindustan is characteristic of

Ancestor-worship an Aryan usage.

the Aryan race, and the Semitic modes of such worship had not the faintest resemblance to the obsequial offerings presented by us to our departed ancestors.

LECTURE I.

Inferred from the similarity of ceremonies performed by different nations.

You will thus see that ancestor-worship was a very common form of primitive worship.[1] It was a tribute of respect paid to the memory of departed ancestors, and was a pleasing expression of the sentiments of love and affection which their descendants bore towards them. The lawgivers and the philosophers of ancient Greece and Rome enjoined it as a sacred duty to the rising generation, and the faithful followers of the Zendavesta and the Veda practise it as a solemn rite of religion to this day. The ceremonies performed by the Aryan nations bear a striking resemblance to each other, and it is a natural inference, therefore, that the common ancestors of the Greeks and the Romans, Zoroastrians and Hindus, honored and worshipped their departed forefathers before they left their original seat at the source of the Oxus and Jaxartes. "If we find," says Cox, "that in the traditions of different Aryan tribes the same characters reappear with no other difference than that of title and local colouring, the inference is justified that a search into the mythical stores of all the Aryan tribes would disclose the same phenomenon. If our conjectures are verified here, it will be impossible to withstand the conclusion that these tribes must have started from a common centre, and that from their ancient home

[1] Spencer's Principles of Sociology.

LECTURE I. they must have carried away, if not the developed myth, yet the quickened germ from which might spring leaves and fruits, varying in form and hue according to the soil to which it should be committed and the climate under which the plant might reach maturity."[1]

[1] Myth. Aryan Nations, Vol. I, p. 99.

LECTURE II.

ORIGIN AND GROWTH OF ANCESTOR-WORSHIP.

Primitive form of ancestor-worship described in the Rig-Veda—Simplicity of its spirit—*Pitris*—Solemn sacrifices in honor of the dead formed no part of the Vedic ritual at first—The term *pitris* in the Rik hymns applicable to ancestors in general—Its limitation to the first three ancestors in the White Yayur-Veda—Later classification into "cognates," "agnates," and "gentiles"—Materials abundant to show the link between ancestor-worship and the rules of inheritance—Funerals in the Vedic times described—Hindu form of worship three thousand years ago—Hymns: invocation—Salutation—Presence of the invoked ideally realized—Prayer for protection—Blessings, Forgiveness, and sufficiency—Concluded with prayer to the fire—Second hymn elucidated by Rig-Veda glossator—Law and moral usages of the commentator's times based upon the revealed Scriptures of the Hindus—*S'ráddha* not mentioned in the hymns—Yájnavalkya—His dissent from the teachings of his times—His innovations upon the Vedic faith—"Ancestral sacrifice"—"*Pitaras*"—His system gradually expanded by later teachers—Quotations from his work—Modern "S'ráddha" distinguished from Vedic "ancestral sacrifice"—Its origin in *Pitriyajna*—*Pitri-loka*, or ancestral region—Vedic doctrine of future life compared with the Greek—Vedic account of the enjoyments of the future state—These enjoyments limited to the sensual—Yájnavalkya's doctrine—Knowledge, its end and aim—Inferiority of the Vedic doctrine—Hindu theory of future existence examined by Professor Roth—Yájnavalkya's idea of the "ancestral abode" far less clear than the Rig-Vedic—Lunar region—*Sutra* period of Vedic literature—A'pastamba—Gautama—Bràhmana period—Sacerdotal order—Basis laid of funeral S'ráddha—Improved teachings of the *Sutra* period authors—Gautama's precepts—A'pastamba quoted—Conclusions—Simple ancestral-worship replaced by daily and monthly S'ráddhas—Persons competent to perform the ceremony defined—Oblations—Persons excluded from the funeral repast—Atheists and usurers—Sons dividing the family estate—Community of property between father and son—Meaning of the term *sapinda* as given by A'pastamba and Gautama—Its etymological sense—Consanguinity—Necessity for narrowing the application of the term—Institutes of Manu—Extracts from Manu—According to Manu six generations of ancestors entitled to obsequial offerings—Pindas being offered to the first three—And crumbs of pindas to the last three—*Lepa*—Seven more generations added by Manu, entitled to libations of water, called Samanodakas—Omission of maternal ancestors in the Institutes—First mention of them by Yájnavalkya as having a claim to pindas—

LECTURE II.

Summary—S'ráddha—Derivation of the term—S'ráddhá means "knowledge of truth," *i.e.*, of the real attributes of the superiors inspiring respect, followed by adoration—Emblematic character of the *S'ráddha* ceremonies—Worship of ancestors due to the feelings of love and gratitude—Patriarcha system the primitive state of society in India—Its prominent features—Joint undivided family offshoot of the patriarchal system—Individual merged in the family; the unit of social organism—Principle of joint family system—Subordination of the private to the common good—Individual emancipation from the family thraldom with the progress of civilization—Due to three causes—1. Intercourse with people beyond the pale of the family circle—For purposes of commerce—Navigation—Supremacy—Travel: its usefulness in fostering independence of spirit—2. Growth of philosophy—Retirement from secular cares and anxieties. Creed of Egoism—Religion—Consciousness of accountability after death for acts done *inter vivos*—S'ráddha ceremonies reconciliatory of the struggle between the individual and the family for supremacy—All Souls' day of the Hindus—Parvana S'ráddha—Religious sanction of sraddha rites—Obsequial rites classified—1. Initiatory—2. Intermediate—3. Conclusive—Their end and object: re-embodiment of the soul—Elevation to heaven—Association with the manes—Eternal beatitude—Dwellers in "ancestral region" dependent upon *pindas*—Necessity for adoption—Period of sojourn in the "ancestral region" determined by good or bad deeds on earth—Popular notion regarding the "*pitris*" and *pitri-loka*—S'ráddha rites form the essential elements in the religious and legal codes of India.

Primitive form of ancestor-worship described in the Rig-Veda.

We find the first trace of ancestor-worship in the Rig-Veda, the most ancient written record of the Aryan family. It occurs there in its most primitive form. The spirits of the dead ancestors are invoked to bless their children and their children's children, to confer upon them long life and prosperity, and to protect them from the evils inseparable from human existence.

Simplicity of its spirit.

A childlike simplicity pervades, in the earlier books of the Rig-Veda, the spirit of the hymns sacred to the *pitris* or ancestors, and we cannot but believe that the inspired sages of ancient India never dreamt of the elaborate systems of ancestor-worship invent-

ed in comparatively modern times by the followers of the Brahmanic faith. Roots and fruits, milk and butter, are offered to the dead, and they are earnestly prayed to come and sit among their children on the *kusa* grass spread for them, and to eat the simple food placed before them. The spirits in invisible forms come before their children, taste the food presented in love to them, applaud those who thus remember them, and depart in peace, strengthened by the invigorating drink offered to them. In the ceremonial of the Rig-Veda, the ancestors are generally known as *pitris*, and are not separately distinguished. A general offering was given, probably corresponding to the *enagismata* of the Greeks.[1] The word ancestral sacrifice is mentioned only *once* in the Rig-Veda,[2] and that in such a way as plainly to indicate that solemn *sacrifices* in honor of the dead did not originally form a part of the Vedic ritual. The paternal and maternal ancestors were not mentioned by name, and whatever might be the interpretation given by the later lawgivers to the Rik hymns celebrating the *pitris*, the original authors of them studiously refrained from enumerating the *pitris* invoked by them. The *pitris* are always mentioned in the plural number, and it seems to be clear, therefore, that the Vedic oblations of roots and fruits, water and milk, butter and rice, were intended for all the ancestors in gene-

Pitris.

Solemn sacrifices in honor of the dead formed no part of the Vedic ritual at first.

The term *pitris* in the Rik hymns applicable to ancestors in general.

[1] Smith's Greek and Roman Antiquities.

[2] Rig-Veda, X, 16. 10.

LECTURE II. — ral. Who these ancestors were, and what was meant by the term *pitaras*, there is no means of ascertaining from the wording of the hymns.

Its limitation to the first three ancestors in the White Yayur-Veda.

The White Yayur-Veda, which must have been composed at least four hundred years after the compilation of the Rik hymns, goes a step further, and mentions the three immediate ancestors—father, grandfather, and great grandfather—by name. This shows progress in the Vedic ideas of *pitaras*, and goes a great way in proving the assertion that ages elapsed before the cognates and agnates and gentiles in the modern digests of Hindu law were evolved out of this simple expression *pitaras*, or *patres*. The intimate connection between, and the gradual development of, ancestor-worship and of the principles of Inheritance, is the aim and scope of the present course of lectures; and I hope to be able to point out the landmarks and to give a general outline of this important subject. There are materials in abundance in the original Sanskrit works, Vedic and non-Vedic, legal and ceremonial, which, if properly used, are sure, after a patient investigation and thoughtful study, to yield a rich harvest of important juridical truths.

Later classification into 'cognates,' 'agnates,' and 'gentiles.'

Materials abundant to show the link between ancestor-worship and the rules of inheritance.

Funerals in the Vedic times described.

Before I proceed further, I would draw your attention to the following account of the Vedic funerals:

"When the remains of the deceased have been placed upon the funeral pile, and the process of cremation has begun, Agni, the god of fire, is prayed not to scorch or consume the departed, not to tear

asunder his skin or his limbs, but after the flames have done their work, to convey to the fathers the mortal who has been presented to him as an offering. The eye of the departed is bidden to go to the sun, his breath to the wind, and his different limbs to the sky, the earth, the waters, or the plants, according to their several affinities. As for his unborn part, Agni is supplicated to kindle it with his heat and flame, and assuming his most auspicious form, to convey it to the world of the righteous. Before, however, this unborn part can complete its course from earth to the third heaven, it has to traverse a vast gulf of darkness. Leaving behind on earth all that is evil and imperfect, and proceeding by the paths which the fathers trod, the spirit, invested with a lustre like that of the gods, soars to the realms of eternal light, in a car, or on wings, on the undecaying pinions wherewith *Agni* slays the *rakshasas;* wafted upwards by the *Maruts*, fanned by soft and gentle breezes, and refreshed by showers, recovers there its ancient body in a complete and glorified form; meets with the forefathers who are living in festivity with *Yama;* obtains from him, when recognized by him as one of his own, a delectable abode; and enters upon a more perfect life, which is crowned with the fulfilment of all desires, and which is passed in the presence of the gods, and employed in the fulfilment of their pleasure."[1]

[1] Muir's Sanskrit Texts, Vol. V, p. 303.

LECTURE II.

Hindu form of worship three thousand years ago.

I will now give you a few hymns which will explain the nature of ancestor-worship prevalent among the Hindus three thousand years ago. The following extract is taken from the Tenth Book of the Rig-Veda :[1]—

Hymns: invocation.

"May the soma-loving fathers, who are both of low degree and of high rank, rise and accept the clarified butter we offer unto them. There is not one among us who bears any ill-feeling towards them. They truly know how we are disposed towards them, and so they have come to us to preserve us from harm. Oh! let them come, and protect us from evil in the performance of these our sacrifices.

Salutation.

"Salutation to the fathers, who were born before me, and those who, though born after me, have already departed from this world before me. Salutation to my fathers, who are sitting on the bare ground among friends well able to entertain them with the richest viands.

Presence of the invoked ideally realized.

"My ancestors have honored me with their presence. They know the love and respect I bear towards them. The sacrificial rites have fairly commenced and will have an auspicious end. My fathers are sitting upon the *kusa* grass I have spread for them, and are eating the food, and drinking the soma juice I have placed before them.

Prayer for protection.

"Fathers, who are now sitting upon the *kusa* grass, you will have to protect us, your children,

[1] Rig-Veda, X, 15.

ignorant of the ways of the world. Accept this clarified butter we have prepared for you, and then give us effective protection, and increasing our happiness, remove the cause of our grief, and save us from sin and misery.

LECTURE II.

"This sacrificial butter is like a precious gem, dear to you. Come near unto this, we pray you, kind fathers; give a gracious hearing to your praises; speak well of us, and confer blessings upon us.

Blessings,

"Sitting at your ease at my right hand, may all of you accept these oblations we offer unto you. If we commit any offence against you, through our human infirmities, fathers, forgive us.

Forgiveness,

"I am but a weak and mortal man, but I give unto you this clarified butter—it is all I possess. Sitting near these bright flames I have kindled for you, give unto us and to our children enough to live upon—enough to make us happy.

and sufficiency.

"O! ye bright and omniscient flames, you know all about my fathers, whoever and wherever they may be. Those who are here and those who are not here; those whom we know and those whom we do not know—all, all of them are known to you. Preside at this sacrifice, and accept the food I offer unto you."

Concluded with prayer to the fire.

The "sacrifices" which are mentioned here could not have been attended with those elaborate and complicated ceremonials met with in later Vedic writings. They must have been simple offerings, presented with

LECTURE II.

a full and loving heart, and dignified by the name of "sacrifices."

Second hymn elucidated by Rig-Veda glossator.

Sáyanácharya, the celebrated commentator on the Rig-Veda, who flourished at the court of Vijayanagara in the fourteenth century, gives the following traditional explanation of the second hymn quoted above :—

"By the expression *those who were born before me* is meant those who were born before the birth of the sacrificer, *viz.*, elder brothers, grandfathers, and others ; and by the expression *born after me* is meant younger brothers, his own sons, and others."

Law and moral usages of the commentator's times based upon the revealed Scriptures of the Hindus.

Sáyana here is trying to base the ceremonial funeral fabric of his day, which contained within it descendants and ascendants, collaterals and cognates, upon the simple Vedic foundation contained in the words "born before" and "born after." Sáyana, it should be remembered, lived nearly two thousand years after the Vedic hymns were composed. Revolutions upon revolutions had passed over the land, uprooting the old Vedic ideas, and introducing entirely new notions about religion, morality, and property. The Bràhmanic theogony had flourished and decayed, and Budhism had spread its influence far and wide, shaking to its foundation the ancient faith of the country. The Bràhmanic revival was still struggling to assert its domination over the minds of men, when Sáyana and Mádhava, availing themselves of those means which their situation and influence secured

them, employed the most learned Bràhmans they could attract to Vijayanagara upon the works which bear their names, and to which they contributed their own labour and vast stores of learning. It was their object to show that the systems of law and morality which were prevalent in their age, had grown out of the revealed Scriptures of the Hindus, and should, therefore, be accepted as sacred law. Their forced interpretation of the Vedic texts sounds sometimes very strange in our ears, but it is a natural propensity of human nature to ground its belief of the present upon that of the past, which is ever hallowed in the minds of men.

S'ráddha not mentioned in the hymns.

It will be seen in the extract given above, that though the word "sacrifice" is often mentioned, the word *S'ráddha*—the *ancestral sacrifice* of the later lawgivers—was never used. The word *S'ráddha* came into existence long after the Vedic ceremonial had hardened into shape.

Yájnavalkya.

I will give the next extract from the *Vájasaneya Sanhitá* of Yájnavalkya, better known as the White Yayur Veda.

His dissent from the teachings of his times.

The exact time when Yájnavalkya flourished cannot be ascertained, but there cannot possibly be a doubt that he composed his great work many hundred years after the Rik hymns had formed the standard of faith of the Aryan Hindus. He also was an inspired sage, and his word was law to millions of Aryan Hindus. He was a dissenter from the religious

LECTURE II.

teachings and practices of his time, and his work originated in a schism, of which the great sage was a leader. He was a reformer, but a reformer of the Vedic type. He introduced many new ideas into the Vedic faith, but these were strictly modelled upon those he received from his spiritual teachers following the ancient path. The words "ancestral sacrifice" had come into more general use, and the expression "*pitaras*," or *patres*, was beginning to be developed into the more immediate ancestors. It should be remarked, however, that Yájnavalkya, though he inculcated the duty of paying homage to the three immediate ancestors of the sacrificer, could not boldly come forward and enjoin upon his followers their absolute obligation of offering sacrificial food to them, and thus connect them with the *patres* of the preceding generation. He uses the word "*svadhá*," or food, but does not say what connection this food had with the "salutation," which immediately followed it. Probably he wished to invoke the spirits of the ancestors to taste this food, but he could not boldly speak out his mind. That would be, he probably thought, too great an innovation upon the preceding ceremonial.

His innovations upon the Vedic faith.

"Ancestral sacrifice."

"*Pitaras.*"

His system gradually expanded by later teachers.

He was yet feeling his way; but a fair beginning was made, and the later teachers following his lead, gradually expanded his system of funeral obsequies into their present shape. Many of the prayers and hymns made use of during the present age on the occasion of performing the *S'ráddha* ceremonies are

Lecture II.

borrowed from the Vájasaneya Sanhitá of Yájnavalkya. Let us see now what Yájnavalkya himself says upon this subject :—

Quotations from his work.

"Gratify my ancestors, O! ye invigorating waters! Ye are all in all to us. Ye are food fit for our progenitors; ye are nectar and milk, clarified butter and fruits collected in spring.[1]

"May our progenitors, who are worthy of drinking the soma-juice, and who have been purified by fire, approach us through the paths travelled by gods; and pleased with the food presented at this sacrifice, may they ask for more, and preserve us from evil.[2]

"Ancestors! rejoice, take your respective shares, and be strong as bulls.[3]

"Give us, O! fathers, houses and wives and children, that we may not want for anything. May you accept the garments, O! fathers, we offer unto you.[4]

"May those in my family, who have been burnt by fire, and those who have not been so burnt, be satisfied with this food presented on the ground, and proceed contented along the supreme path of eternal bliss.[5]

"We invoke thee, O! Lord, and place thee in our heart of hearts. In taking thy name, the darkest recesses of our minds shine with divine light. Listen to our prayers, and let our ancestors come unto us

[1] II, 2, 34. [2] XIX, 58. [3] II, 31.
[4] II, 32. [5] XIX, 59.

LECTURE II.

and taste the clarified butter we shall offer unto them.[1]

"Here is food. Salutation unto our fathers, who would gladly eat this food.

"Here is food. Salutation unto our grandfathers, who would gladly eat our food.

"Here is food. Salutation unto our great grandfathers, who would gladly eat our food.

"Our fathers have eaten our food; our fathers have rejoiced; our fathers are gratified; give your blessings unto us, O! fathers.

"Let my fathers, drinking the soma-juice, purify me; let my great grandfathers bless me with a hundred years of life, which I may pass in joy and holiness.

"Let my grandfathers purify me; let my great grandfathers sanctify me, and bless me with a hundred years of life. May I attain the age allotted to man."[2]

Modern "S'ráddha" distinguished from Vedic "ancestral sacrifice."

It should be carefully borne in mind that neither in the Rig-Veda, nor in the White Yayur-Veda, is there any mention of the *S'ráddhas* of the present age. Their "ancestral sacrifice" is a daily sacrament, which is observed to this day. The funeral *S'ráddha* is a later institution, and is quite distinct from the ancestral sacrifice of the Rik and the Yayu. It cannot,

Its origin in *pitri yajna.*

however, be doubted that the *S'ráddha* originated in *pitri yajna*, but is not identical with it. The

[1] Rig-Veda, X, 16, 12, vv. 19, 70.

[2] XIX, 36, 37.

mantras used on both occasions are in many instances the same, but still there is a line of demarcation between them, and they should on no account be confounded with each other.

LECTURE II.

In the *Satapatha Bráhmana*, which is also ascribed to Yájnavalkya, and which is the most complete and systematic of all the *Bráhmanas*, mention is made of a *pitri-loka*,[1] or ancestral region.

Pitri-loka, or ancestral region.

It would be interesting to compare the Vedic doctrine of a future life with that of the Greeks :—

Vedic doctrine of future life compared with the Greek.

"The Elysian plain, or 'land of the dead,' is, according to the Greeks, far away in the west, where the sun goes down beyond the bounds of the earth, and Eôs gladdens the close of day as she sheds her violet tints over the sky. The abodes of the blessed are golden islands sailing in a sea of blue, the burnished clouds floating in the pure ether. Grief and sorrow cannot approach them; plague and sickness cannot come near them. The blissful company gathered together in that far western land inherits a tearless eternity. What spot or stain can be seen on the deep blue ocean in which the islands of the blessed repose for ever? What unseemly forms can mar the beauty of that golden home lit by the radiance of a sun which can never go down? Who then but the pure in heart, the truthful, and the generous can be suffered to tread the violet fields ?"[2]

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[1] Weber's Edition of Satapatha Brahmana. p. 1101.

[2] Cox, Vol. II, 322.

LECTURE II.

"In the earlier books of the Rig-Veda there is little reference to a future state, but in the ninth and tenth it is frequently mentioned. A state of blessedness is distinctly promised to the virtuous, and these allusions are more full and frequent in the Atharva. In some passages of the latter, the family ties of the earth are represented as renewed in heaven."[1]

Vedic account of the enjoyments of the future state.

The enjoyments of the future state are said in the Rig-Veda[2] to be conferred by the god Soma.

"Place me, O! purified Soma, in that imperishable and unchanging world, where perpetual light and glory are found. Make me immortal in the realm where king *Vaivasvata* dwells, where the sanctuary of the sky exists, and where pure and sweet waters flow. Make me immortal in the third heaven, in the third sky, where action is unrestrained, and the regions are luminous. Make me immortal in the world, where there are pleasures and enjoyments—in the sphere of the sun—where ambrosia and satisfaction are found. Make me immortal in the world, where there are joys, delights and pleasures, and gratifications, and where the objects of desire are all attained."

These enjoyments limited to the sensual.

The "pleasures" and "gratifications" spoken of here by the inspired Rishis of the Rig-Veda are all of a sensual kind, and we search in vain for those spiritual "joys and pleasures," of which so

[1] Muir's Sanskrit Texts, Vol. V.
[2] IX, 113. 7.

much has been said in the later writings of the Bràhmans.

Yájnavalkya's doctrine.

In the Satapatha Bráhmana,[1] however, we find thoughts running in a different channel. We meet with ideas of a transcendental nature, of which it is impossible to form a clear conception. The sublime mysticism of the later philosophers must have owed its origin to the mystic doctrine of a future state propounded by Yájnavalkya :—

Knowledge, its end and aim.

"This soul is the end of all this. It abides in the midst of all the waters. It is supplied with all objects of desire. This soul is free from desire, and yet possesses all the objects of desire, for it desires nothing. On this subject there is this verse: 'By knowledge men ascend to that condition in which desires have passed away. Thither gifts do not reach, nor austere devotees who are destitute of knowledge; for no person attains that world by gifts or by rigorous abstraction. It pertains only to those who have such knowledge.'"

Inferiority of the Vedic doctrine.

There is much in this which commends itself to enlightened reason, but there is much also which cannot be comprehended by human reason unaided by the spirit of the inspired sage who propounded this doctrine. We cannot stop here to analyse it, but we cannot refrain from stating that Yájnavalkya's ideas about the state of blessedness after death are superior to those of the authors of the hymns of the Rig-

[1] X, 5, 4, 15.

LECTURE II.

Veda. The joys of the "ancestral region" are not, according to him, sensual enjoyments, whatever else they may be.

Hindu theory of future existence examined by Professor Roth.

Referring to the Hindu doctrine of a future state, Professor Roth says:[1]—

"The place where the glorified ones are to live is heaven. In order to show that not merely an outer court of the divine dwellings is set apart for them, the highest heaven, the midst or innermost part of heaven, is expressly spoken of as their seat. This is their place of rest; and its divine splendour is not marred by any specification of particular beauties or enjoyments, such as those with which other religions are wont to adorn the mansions of the blessed. There they are happy; the language used to describe their condition is the same as that with which is denoted the most exalted felicity. 'What shall be the employment of the blest, in what sphere their activity shall expend itself?' To this question ancient Hindu wisdom sought no answer."

Yájnavalkya's idea of the "ancestral abode" far less clear than the Rig-Vedic.

Whatever may be the opinion of enthusiastic European scholars upon this subject, we are bound to say that the ideas of Yájnavalkya and his followers about the "ancestral abode" are not very clear and suggestive. The poets of the Rik hymns described the ancestral world as similar in every respect to the world we live in, only the blessed beings were free from the evils of life, and their enjoyments were

[1] Jour. Amer. Ori. Soc., III, 343.

increased to a far greater extent than could be expected amidst the troubles and anxieties, bustle and tumult, of human existence. The poets of the Rig-Veda would appear to be more rational in their explanations than the great author of the Satapatha Bráhmana. But the explanation given by the Rishis of the Rig-Veda has been thought to be unsatisfactory by the later philosophers,—or rather, to speak with greater precision, the materialistic language of the Vedic poets is said to contain within it a rich mine of profound truths, which far-reaching wisdom alone can discover! Yájnavalkya must have had a glimpse of these transcendental truths; but it is extremely difficult to understand the meaning of his words. He spoke in enigmas, which it is impossible to unriddle. We are anxious to know his ideas about "the ancestral region," of which mention is made so often in his writings. He might have communicated in confidence the holy secrets of this blessed abode to *Maitreyi*, his beloved wife and favorite disciple; but he has left us entirely in the dark, and his uttered sayings give us no clue to his profound thoughts on this subject. But there can be no doubt that the seed sown by him fructified, and as a result we have in later days a boundless "lunar region," inhabited by seven classes of corporeal and incorporeal spirits of departed ancestors, and the progenitors of the human race.

LECTURE II. —

Lunar region.

I will now give you a few extracts from works com-

Sutra period of

LECTURE II. — Vedic literature. posed by human authors during the Sutra period of Vedic literature, which extended, according to Max Müller, from 600 to 200 B. C. The extracts A'pastamba. are taken from Gautama and A'pastamba, the latter of whom cannot, according to recent researches, be Gautama. placed later than the third century B. C. Gautama flourished before A'pastamba, but his exact age cannot be ascertained. Gautama's work can safely be declared, however, to be the oldest of the existing works on sacred law.[1]

The Sutra period does not immediately follow the age of hymns and prayers. Another period, called Bràhmana period. the Bráhmana period, intervened between them. Ritual and liturgy were the chief objects of the writings of this age. But these writings were full of philosophical speculations about the origin of things and the destiny of man. The Vedic hymns were invested with supernatural charms, and legends were invented to give shape and form to ideas about law and morality which lay dormant in the minds of the inspired giants of remot antiquity. Myths and traditions had gathered round the old hymns; these were systematized, and gave rise to the untram- Sacerdotal order. melled theological dreamers of this age. The priestly order was instituted, and its power and influence were fully established. The members of this class, well versed in Vedic lore, monopolized the teaching of sacred truths, and laid the foundation of that

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[1] Sacred Books of the East, Bühler, Vol. II, p. liv.

theological sovereignty which brought under its sway the conscience and will of all the subsequent generations. The simple "ancestral sacrifice" of the Rik and Yaju was maintained intact, but the basis of another sacrifice, the funeral *S'ráddha*, was laid, which in time well nigh supplanted the parent institution. In the *Aitareya Bráhmana* attached to the Rig-Veda, we find that "ancestral sacrifice" had become an unquestioned article of faith, and the denizens of the "ancestral region" had defined rights and privileges.[1] The writers of the Sutra period improved upon the teachings of their predecessors, and converted the funeral sacrifice into "a feast of the dead." In the *Grihya Sutras* of A'swalayana, comprising rules for the conduct of domestic rites and the personal sacraments, extending from the birth of a man to the end of his life, we find that the "annual," the "occasional," and "the general" ancestral sacrifices had crystallized into form, and directions were given for their performance. We will not, however, analyse the canons of this sage, but will come at once to Gautama and A'pastamba, from whom all the subsequent lawgivers drew their inspiration. We will hear from their own lips what they have to say about our obligation to perform the *S'ráddha.*

Basis laid of funeral S'ráddha.

Improved teachings of the *Sutra* period authors.

GAUTAMA, CHAP. 15 :[2]

Gautama's precepts.

"He, the sacrificer, shall offer the funeral oblations

[1] Aita. Br., Haug's Ed., p. 226.
[2] Sacred Books of the East, Bühler, Vol. II.

LECTURE II. to the manes on the day of the new moon. No restriction as to time and place need be observed, if holy Bràhmans are at hand, or if he is near a particularly sacred place.

"On failure of sons, the deceased person's *sapindas*, the *sapindas* of his mother, or a pupil shall offer the funeral oblations. On failure of these, an officiating priest or teacher.

"Let the sacrificer select as good food as he can afford, and have it prepared as well as possible.

"The manes are satisfied by gifts of sesamum, rice, barley, and water; by fish, and the flesh of deer, hares, turtles, boars, and sheep; by cow's milk; and by the flesh of cranes, goats, and of a rhinoceros, mixed with honey.

"Let him entertain such as possess divine knowledge, and such as are endowed with eloquence and beauty, of a suitable age, and of a virtuous disposition. Let him feed upwards of three, or one guest at least, endowed with particularly good qualities."

A'pastamba quoted.

The following extract is taken from A'PASTAMBA, PRASNA II:[1]

"On account of the blood-relations of his mother, and on account of those of his father within six degrees, or as far as the relationship is traceable, he shall bathe, if they die.

"At all religious ceremonies, he shall entertain Bráhmans, who are pure, and who have studied and

[1] Sacred Books of the East, Bühler, Vol. II.

remember the Veda. That food must not be eaten of which no portion is offered in the fire, and of which no portion is first given to guests. No food mixed with pungent condiments or salt can be offered as a burnt offering.

"A female shall not offer any burnt oblation, nor a child that has not been initiated.

"Formerly men and gods lived together in this world. Then the gods, as a reward for their sacrifices, went to heaven, but men were left behind. Those men who perform sacrifices in the same manner as the gods did, dwell after death with the gods and Brahmá in heaven. Now, seeing men left behind, Manu revealed this ceremony, which is designated by the word *S'ráddha:* and thus this rite has been revealed for the salvation of mankind. At that rite the manes (of one's father, grandfather, and great grandfather) are the deities to whom the sacrifice is offered. But the Bráhmanas who are fed, are the sacrificial fire (the mouth of the gods).

"That rite must be performed in the latter half of every month. Numerous and distinguished offspring, success in agriculture and trade, store of cattle, success in battle, and the attainment of general prosperity, are the rewards which the sacrificer obtains, if he performs the ceremony at stated periods.

"The substances to be offered at these sacrifices are sesamum, rice, barley, water, roots, and fruits. But the satisfaction of the manes is greater, if food is

LECTURE II.

mixed with fat, and if *beef*, buffalo's meat, and the flesh of other tame and wild animals is offered to them.

"He shall not perform a funeral sacrifice at night, unless an eclipse of the moon takes place.

"Now follows the daily funeral oblation. This he shall perform every day during a year. After that he may offer a funeral sacrifice once a month, or stop altogether."

Conclusions.

Simple ancestral-worship replaced by daily and monthly S'ráddha.

Here we see that the primitive ideas about ancestor-worship have undergone a change. The simple ancestral sacrifice has been replaced by the daily and monthly *S'ráddhas*, and a new word for "ancestral sacrifice" has been coined to express the new ideas. The *S'ráddhas* have become recognized as a permanent religious institution of the country. The persons entitled to perform the ceremony have been defined. Sons, and sapindas, *ex parte paterna* and *ex parte materna*, are, according to Gautama, fully competent to perform the exequial rites. Ápastamba could not, it is true, go so far. The blood-relations of the deceased, both through father and mother, he says, are affected by impurity. Though as yet no connection is sought by him to be established between these and the persons entitled to perform the S'ráddha ceremony, still it cannot but strike a careful observer that the bonds between them are being drawn closer and closer, and that it would not be long before the blood-relations, both paternal and maternal, would

Persons competent to perform the ceremony defined.

be acknowledged as those whose imperative duty it was to offer funeral oblations to their deceased kinsman. To the simple presents of roots and fruits were added burnt oblations and meat offerings, and even *beef*, the very touch of which contaminates a pure Hindu, and for which a severe penance is required to free him from defilement, was considered as a great delicacy, by tasting which but once "the manes became satisfied for a year."

LECTURE II.

Oblations.

Minute directions are given both by Gautama and Ápastamba as to the class of men who should be invited to the funeral repast. "Atheists" and "usurers" were mercilessly excluded, and it is to be particularly noted that "sons who have enforced a division of the family estate against the wish of their fathers" should on no account be invited to the feast of the dead. They were outcasts in Hindu society, and were looked upon with contempt.

Persons excluded from the funeral repast.

Atheists and usurers.

Sons dividing the family estate.

This prohibition points to a very significant fact. Community of property between fathers and sons was held to be a firmly established institution of the country; but at the same time the son's title to the ancestral property was at the time of Gautama as good as that of his father; and if the former wished, he could force his father to make a partition, and such partition was acknowledged to be just and right, and was fully sanctioned by the law of the country.

Community of property between father and son.

We may remark in passing that the word *sapinda*

Meaning of the term

LECTURE II.

sapinda as given by A'pastamba and Gautama.

often occurs both in Gautama and A'pastamba. Gautama lays it down that "sapinda relationship ceases with the fifth or the seventh ancestor."[1] A'pastamba says, that it extends to blood-relations of mother and father within six degrees. Haradatta, the learned commentator on Gautama, states that the *Sapinda* relationship, spoken of by Gautama, "extends to four degrees in the case of the son of an appointed daughter, while it includes relatives within *six* degrees in the case of the legitimate son of the body."[2] If this explanation of the texts of our authors be accepted, there is apparently no difference of opinion between them with regard to the much contested *Sapinda* relationship. Both of them restrict it to six generations, excluding the deceased. This definition evidently includes ascendants, descendants, and collaterals, but the precise degree of kindred in which a relative should stand to the deceased person to entitle him to be called a *Sapinda* is not clearly indicated. There is nothing also in Gautama's reference to *Sapinda* relationship to show that he considered that relatives on the mother's side were considered by him as *Sapindas*.

Its etymological sense.

We will not further discuss this point at present, but reserve our remarks for a future Lecture. Suffice it to say, however, that the word *sapinda*, according to one class of writers, is derived from "saha," with, and

[1] Gautama, Ch. XIV, 13.

[2] Sacred Books of the East, Bühler, Vol. II, pp. 136, 247.

"pinda," body. This derivation is angrily rejected by another class of lawyers. The etymological sense, however, in which the word is understood by the former class of writers is "persons proceeding from the same body," "children of the same ancestor." In this sense sapinda-relationship means "consanguinity," and *sapindas* would include all the relatives on the father's and mother's side, extending to generations untold. This would "make the whole world kin," and all the nations of the earth would claim this relationship. The title to the property of the deceased depended, in a great measure, upon the right of the claimant to this relationship; and it was necessary, therefore, to restrict the term within certain bounds. Both Gautama and Ápastamba felt this difficulty, and limited the signification of the word to "six degrees," counting from, but excluding, the deceased. We shall revert to this subject, and show through what different stages of progress the word has passed in the course of at least two thousand years. The word has a history of its own replete with interest, and if this history could be scientifically traced to its source, a great portion of the ancient history of India would be unearthed, and the different phases of thought of the Aryan Hindus would be clearly displayed—to the lasting benefit of philosophical inquirers into the ancient condition of India.

LECTURE II.

Consanguinity.

Necessity for narrowing the application of the term.

We come now to comparatively modern times. Our next extract will be taken from the Institutes of

Institute of Manu.

LECTURE II.

Manu, the father of modern lawgivers. The Code of Manu is the foundation of modern Hindu law, and is held in the highest reverence. The age of the Code is supposed by some to be the fifth century B. C. The internal evidence it contains, however, makes it probable that the work was composed at least three or four centuries later. We will discuss this point in a future lecture. Suffice it to say in the meantime, that it is a record of old Hindu society worthy of veneration, and is a most important digest of the current laws and creeds of an age long anterior to the modern schools of Hindu jurisprudence. The following extract is from the third Chapter of Manu:—

Extracts from Manu.

"From month to month, on the dark day of the moon, let a twice-born man having finished the daily sacrament of the *pitris*, and while fire is still blazing, perform the solemn *S'ráddha* in honor of his ancestors.

"At the *S'ráddha* of the gods he may entertain two Bràhmans; at that of his father, paternal grandfather, and great grandfather, three; or one only at that of the gods, and one at that for his three paternal ancestors: though he abound in wealth, let him not be solicitous to entertain a large company.

"With great care let him give food at the S'ráddha to a priest who has gone through the Rik or Yaju, or Saman. With that man whose oblation has been eaten, after receiving due honors, by any one of those three Bràhmans, the ancestors are constantly satisfied as high as the seventh person (or to the sixth degree).

"The divine manes are always pleased with an oblation in empty glades, on the banks of rivers, and in solitary spots.

"Having walked in order from east to south and thrown into the fire all the ingredients of his oblation, let the sacrificer sprinkle water on the ground with his right hand. From the remainder of the clarified butter, after having formed three balls of rice, let him offer them with fixed attention, in the same manner as the water, his face being turned to the south.

"Then having offered those balls, after due ceremonies and with an attentive mind (to the manes of his father, his paternal grandfather, and great grandfather), let him wipe the same hand with the roots of *kusa*, which he had before used, for the sake of his paternal ancestors in the fourth, fifth, and sixth degrees, who are the partakers of the rice and clarified butter thus wiped off.

"If his father be alive, let him offer the S'ráddha to his ancestors in three higher degrees. Should his father be dead, and his grandfather living, let him, in celebrating the name of his father (that is, in performing obsequies to him), celebrate also his paternal great great grandfather.

"Before the obsequies to ancestors as far as the sixth degree, they must be performed to a Bràhmana recently deceased; but the performer of them must in that case give the S'ráddha without the ceremony

LECTURE II.

to the gods, and offer only one round cake (and these obsequies for a single ancestor should be annually performed on the day of his death).

"When, afterwards, the obsequies to ancestors as far as the sixth degree, including him, are performed according to law, then must the offering of cakes be made by the descendants in the manner before ordained (for the monthly ceremonies).

"A householder (unable to give a monthly repast) may perform obsequies here below, according to sacred ordinance, only thrice a year, in the seasons of winter, and summer, and during the rains."

According to Manu six generations of ancestors entitled to obsequial offerings.

It will be observed that Manu has added three more ancestors to the list of the immediate three; or, in other words, the father, the grandfather, and the great grandfather of the great grandfather of the sacrificer are, according to him, also entitled to obsequial offerings. Six generations of ancestors form, in this manner, a community of progenitors whose names must be celebrated, and to whom a tribute of respect must be paid, by their descendants, at least thrice every year.

Pindas being offered to the first three;

A distinction, however, is made between the three immediate ancestors and the three beyond them. The solemn *S'ráddhas* are to be performed in honor only of the former, and the *pindas* or balls of food are to be offered only to them. The latter are not entitled to pindas, but to what may be called the crumbs or filings of pindas. They are partakers

and crumbs

only of the divided oblations of the rice and clarified butter wiped off from the hand with the roots of *kusa* grass. These three ancestors are the *sakulyas* of the modern Digests of Hindu Law.

LECTURE II. — of pindas to the last three.

Manu, however, does not stop here. In the chapter treating of impurity caused by the death of a near relative, he speaks of another class of ancestors who are evidently entitled, not to offerings of food, but to oblations of water. His definition of these ancestors is not clear and exhaustive. He apparently left room for a further addition being made. The thin end of the wedge was introduced at this point, and seven additional generations of men, known as *Samanodakas* entered by the opening thus made. Manu's *Samanodakas*, or relatives connected "by an equal oblation of water," may also include all persons, whose "births and family names are no longer known."[1]

Seven more generations added by Manu; entitled to libations of water; called Samanodakas.

Manu has thus provided for the *S'ráddhas* of all the paternal ancestors, but the maternal ancestors do not yet come in for a share of the *S'ráddha.* Up to this time, the paternal relationship alone was honored, and the kinsmen through the mother had no place in the family sanctum. By including all the paternal ancestors, even those "whose births and family names are no longer known," Manu had reached the limits of the agnatic family, and no new member could find any entrance into this group, large as it is.

Omission of maternal ancestors in the Institutes.

[1] Manu, Chap. V, 60.

LECTURE II.

First mention of them by Yajnavalkya as having a claim to pindas.

It seemed, however, to Yajnavalkya and his followers, that this was a clear case of injustice to our kinsmen through the mother, and they laid down the rule that the three immediate maternal ancestors are also entitled to pindas from the sons of their daughters. "After funeral obsequies," says Yajnavalkya, "have been duly performed, in honor of paternal ancestors, balls of food should also be offered to the maternal ancestors."[1] This Yajnavalkya must not be confounded with the inspired sage of the Vedic age. This was only his namesake. It is probable that our author incorporated in his treatise the teachings of the Vedic writer, but the latter must not be confounded with the former. Yajnavalkya, the law-giver, probably promulgated his Code towards the middle of the first century after Christ.

Summary.

To sum up.

The Rik-Veda enjoined general offerings to the shades of departed ancestors, and the White Yaju distinctly hinted that, in adoring the progenitors in general, our three immediate ancestors should also be remembered. Gautama and A′pastamba laid it down that the three immediate ancestors had a right to funeral oblations from their descendants, and defined the degrees of relationship within which the competence to perform the *S′ráddha* ceremonies should be confined. Manu commanded that not only the father, the grandfather, and the great grandfather are

[1] Yaj., I, 242.

entitled to obsequial offerings, but the three ancestors beyond them should also partake of butter and rice from the hands of their successive children of children's children. Even the more remote ancestors were not forgotten. If their birth and family names be unknown, balls of funeral cakes cannot be presented to them, but libations of pure water should be given in their honor, that they too from whom we may have derived the least particle of blood, may be satisfied that they live in the minds of posterity, and are gratefully remembered as the first progenitors of the family. Yajnavalkya, the lawgiver, pointed out that the *maternal* ancestors are equally entitled like the paternal ancestors to acts of adoration in the shape of *S'ráddhas*, and the impulse given by him gained accelerated strength in subsequent ages, and created that elaborate system of funeral ceremonies, which has guided, and is still moulding, in spite of foreign influences, the national character.

S'ráddha.

We will analyse now the term *S'ráddha*, and attempt to discover the original idea imbedded in this word. The word is immediately derived from *S'raddhá*, faith, devotion, veneration. The word *S'ráddha*, therefore, means an act prompted by faith or veneration. Now the word *S'raddhá* is derived from two Sanskrit roots: *srat*, truth, and *dhá*, to hold. It signifies, accordingly, the holding of, or belief in,

Derivation of the term.

Sraddhá means

LECTURE II.

"knowledge of truth," i.e., of the real attributes of the superiors inspiring respect, followed by adoration.

truth. This is the literal signification of the word, and it is easy to perceive from this how it came to mean "veneration" for our superiors. Knowledge of truth — knowledge of the real attributes of a superior person inspires us with feelings of respect, and an act of adoration to genuine worth becomes an imperative duty to society. The feeling of respect we entertain towards the objects of devotion leads us to perform acts which may give a visible expression to our emotions, and various expedients are resorted to for accomplishing the object aimed at. Men in all ages have testified their deep sense of respect for a holy man even at the cost of their lives. Gratitude towards those by whom we are benefited naturally disposes us to honor our benefactors. The bond which unites us to our fathers and grandfathers, gives rise to feelings of affection, gratitude, and respect. In the case of our immediate ancestors, gratitude and respect are secondary feelings, it is true; but when influenced by the irresistible spell of love and affection, these feelings prove an inexhaustible source of joy and happiness. The love we feel for our father and grandfather, the gratitude we owe them, and the respect we entertain for them, prompt us to honor their memory when dead; and the act of remembrance takes the form of a solemn offering to the manes of our ancestors. The idea that the spirits of our parents hover round us, and are gratified by our acts of devotion,

takes strong possession of the human mind, when unenlightened by the spirit of divine philosophy. But love and devotion bear no analysis as to their nature, and spurn at the hard realities which would dissolve the charm. We long to show to the spirits of our ancestors that they live in our memory; we realize their embodied existence by the mind's eye, and forgetful of the surrounding world, we become conscious for a moment of their actual presence, and in the exuberance of our feelings we offer them food and water to allay their hunger and thirst. This is *S'ráddha*, the tribute of respect paid to the memory of our ancestors, the food offered to the manes, the solemn feast of the dead.

Emblematic character of the *S'ráddha* ceremonies.

I said before, that ancestor-worship had its origin in the wilds of Central Asia, and that the Greeks and the Romans and the Teutonic nations carried it with them to the countries towards the setting-sun, and that the followers of Ormzad and the worshippers of Brahma brought it with them to Irán, and the land of the five waters. But neither on the banks of the cool Cephisus, the cerulean Tiber, or fabled Rhine, nor on the golden plains of Irán, did this solemn worship attain that stage of development, which it reached on the flowery slopes of the Snowy Range. Awed by the grandeur of the king of mountains, and captivated by the luxuriance of the surrounding plains, the Aryan Hindus, in the enthusiasm of their hearts, poured forth to the Supreme Being those eloquent

Worship of ancestors due to the feelings of love and gratitude.

LECTURE II.

prayers which are embalmed in the most ancient record of the Aryan family; and, in the warmth of their gratitude, they did not forget that they owed it also to their ancestors to honor and remember them. Call it worship, or call it by any other name you please, it was nothing but the warm and spontaneous offering of love and gratitude to the authors of our being.

Patriarchal system the primitive state of society in India.

Abundant evidence can be given of the fact that the primitive society in ancient India consisted of patriarchal families. The story of Sunahsepha, related in the Aitareya Bràhmana, and similar legends supply the evidence in question. The father of Sunahsepha, in the exercise of his unquestioned parental authority, sold his son for a hundred head of cattle, to a prince, with the avowed object of his being offered up as a human sacrifice. No power on earth could rescue him from the grasp of the inhuman father, till divine interference was prayed for, and his life was at last saved by the united efforts of the gods. It is clear from this that the power of the father in his family was absolute, which is one of the chief characteristics of a patriarchal family. The most recent researches have shown that the primitive society in all countries consisted of these patriarchal families.

Its prominent features.

The chief features of the patriarchal state of society are these: The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as

unqualified over his children and their property as over his slaves.[1] This patriarchal group consists of animate and inanimate property, of wife, children, slaves, land, and goods, all held together in subjection to the despotic authority of the eldest male of the eldest ascending line, the father, the grandfather, or even more remote ancestor. The force which binds the group together is power. Taking the conceptions which have their root in the family relation—what we call property, what we call marital right, what we call parental authority, says Sir Henry Maine, were all originally blended in the general conception of patriarchal power. The authority of the patriarch, or *pater familias*, is thus the element or germ out of which all permanent power of man over man has been gradually developed.[2]

Joint undivided family: offshoot of the patriarchal system.

The joint undivided family springs universally out of the patriarchal family, a group of natural or adoptive descendants held together by their subjection to the eldest living ascendant, father, grandfather, or great grandfather. Whatever may be the formal prescriptions of law, the head of such a group is always in practice despotic, and he is the object of a respect, if not of an affection, which is probably seated deeper than any positive institution. But in the more extensive assemblage of kinsmen, which constitutes the joint family, the eldest male of

[1] Maine's Ancient Law, 123.

[2] Maine's Early Institutions, 116, 310, 313, 379.

LECTURE II.

the eldest line is never the parent of all the members, and not necessarily the first in age among them. The sense of patriarchal right never dies out in such groups.[1]

Individual merged in the family—the unit of social organism.

The *S'ráddha* rites originated in that state of society, when all its different elements had coalesced, and had formed a hard compact mass. The different social groups, called families, were sharply defined, and stood out like solid rocks impervious to external influences. They were the units of a social organism, which grew with their growth. Individuals had no separate existence apart from their families. They moved and had their being within their families, but outside this charmed circle their existence was not recognized by society. They were like the component parts of a chemical combination, which by their intimate union produce the compound, but which, when the combination is once formed, cannot again be easily separated from each other. The family was joint and undivided; the joint and undivided action of the individual members kept up its life, and when its members ceased to work for the common benefit, its corporate life became extinct; but with its extinction, the individuals also composing the family lost their power and usefulness, and became mere nonentities in the social organism. The Greek fable of "the belly and the members of the body" points a moral of no ordinary significance. The force of the solid truth

[1] Maine's Early Institutions, 116, 310, 313, 379.

that "Union is strength," was fully realized by the patriarchs of ancient society. The advantages of a joint family are fully appreciated to this day, and seven generations of ascendants and descendants and collaterals are not unfrequently found to live together, within the same family abode, joint in food, worship, and property.

Lecture II.

Principle of joint family system.

The theory of the joint family system is, that all the members must forget their individuality, and all their exertions must be directed towards the common good.

Subordination of the private to the common good.

Personal comforts, personal inclinations, personal feelings, and personal hopes and aspirations must be sacrificed in the service of the joint family. Individual will, and individual freedom of action, must be curbed to promote the interest of the united body. All the members of this corporate body must become like the inanimate kings and queens on the chessboard, and be guided in all their actions by one moving power.

The Hindu joint family, as it has always been constituted, "is really a body of kinsmen, the natural and adopted descendants of a known ancestor. Consanguinity knits all the members together. It is an actual bond of union, and in no respect a sentimental one." All the members are joint in food, in estate, and in worship. "According to a true notion of a joint undivided Hindu family," said the Privy Council, "no member of the family, while it remains undivided, can predicate of the joint undivided property that he, that particular member, has a certain definite

LECTURE II.

share. The proceeds of the undivided property must be brought into the common chest or purse, and then dealt with according to the modes of enjoyment of an undivided family."[1]

Individual emancipation from the family thraldom with the progress of civilization

The ancient organization of society reached its culminating point when it established within its bosom these social groups, capable of self-government, and capable of withstanding, in time of need, all external aggression. But as civilization advanced, and the progress of the country was marked in different directions, the barriers between the different sections of the community became gradually removed, and communism began to lose ground. Individuality awoke from its sleep of ages, and showed signs of renewed life. There were strong symptoms of individuality asserting its independence, and breaking away from the bonds, which held it so long enthralled. Curses and anathemas were of no avail, and the veteran philosophers of Hindu society living upon the traditions of the past, expended the fire of their eloquence in vain to punish social recusancy, and to bring back within the deserted fold those who had already left their protection. The spirit of progress was guiding men's thoughts and feelings with its magic wand, and the sacred traditions all gave way before the irresistible power of individuality. It was the eve of a great revolution, and Hindu society, with all its compact social groups, which were so

[1] Appoovier *v.* Rama Subba Aiyan, Suth. 1 P. C. R., 657.

long thought impregnable, was threatened with destruction. LECTURE II.

The causes which led to the disengagement of the individual from the compact group of his family are not far to seek. Three powerful solvent influences were at work, *viz.:* intercourse with people outside the family group; the growth of philosophical theories; and last, but not least, religion. Due to three causes:

Towards the end of the Bràhmana period, civilization must have made considerable progress in ancient India. The whole system of social organization was fully developed, and the distinction of caste was fully established. The Hindus of that age were a manufacturing people, and, what is more remarkable, they were a maritime and a mercantile people.[1] 1. Intercourse with people beyond the pale of family circle.

A brisk trade was carried on not only between the different provinces of India, but also with China and the other neighbouring countries. Even the Rig-Veda speaks of merchants, covetous of gain, crowding the ocean on a voyage,[2] and gives a vivid description of a naval expedition against a foreign island frustrated by a shipwreck.[3] It is quite clear, therefore, that, even in that early age, the Hindus were quite familiar with the ocean and the neighbouring countries which could be reached only in vessels sailing over the ocean. Distant expeditions on land were also undertaken at this time. The essential condition of the For purposes of commerce. Navigation. Supremacy.

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[1] Wilson's Rig-Veda, Pref.

[2] Rig-Veda, I., 4. 6. 2.

[3] *Ibid.* I., 8. 1, 4.

LECTURE II.

Rájasúya, or the royal sacrifice, was, that the performer must be acknowledged as the universal monarch. There were princes and chiefs in different parts of the continent who did not easily yield allegiance, and it was necessary to send expeditions to force their obedience. In horse-sacrifices, also, an army always accompanied the horse, which roamed at will. Those who opposed the progress of the animal must at once be subdued.

Travel: its usefulness in fostering independence of spirit.

All these facts show that the people were accustomed to travel and leave the conservative family associations behind. In distant journeys, in dwelling among strange people, one is constantly thrown on his own resources, and the idea that he is a free agent, that he is independent of the compact assemblage known as his *family*, becomes deep-rooted in his mind. He sees that, among other nations, persons living apart from their families are happy and contented, and he is naturally led to believe that he too, if he lived separate, would be free from the despotism of his chief, and would be able to gratify his desires and fulfil his hopes and aspirations in a far greater degree than if he dwelt with his family. Discontentment has been said to be one of the chief instruments of progress; be that as it may, discontentment, no doubt, was the first cause which led to the disintegration of the joint family in India.

2. Growth of philosophy.

The second cause was the growth of certain philosophical theories, which attempted to prove the utter

worthlessness of the trammels of existence in the shape of worldly connections. These theories must have come into existence when the first breach was made in the compact family, when the individual member of the family felt that a separate existence was preferable to joint undivided existence. The first step was the institution of the orders or stages of life. This institution allowed an individual member of the family, when he arrived at mature age, to retire from the world, abandoning active life, and giving up his cares and anxieties about the interest of his family, which hitherto engrossed all his attention. The idea of *self*, of *aham* or *ego*, as distinct from its surroundings, then gradually gained ground, and it had its most distinct expression in the famous proposition *aham Bramha*. I am a free agent, the *self* in me is a spark of the divine essence. I am distinct from those who surround me. The notion that *aham*, or *ego*, with all its accidents and limitations, must be preferred to everything which interfered in any way with the full development of individuality, became in no long time an article of the social creed. It is true that it is not exactly like the well-known Roman maxim that "all men are equal," but if its nature be closely examined, it will be seen that it produces the same social results as the other. Once the truth was established that *aham*, or *ego*, or self, was *distinct* from all its accidents,—from the family relations,—the awe and reverence for

Retirement from secular cares and anxieties. Creed of Egoism.

LECTURE II.

the hallowed family associations would be weakened, and steps would soon be taken to ensure personal happiness and personal comforts. This was the second cause, therefore, which tended to disturb the absolute power of the joint undivided family over its individual members.

3. Religion.

The third cause, which operated in undermining the family group, and asserted individual rights to be distinct from those of the family, was far greater in strength than any one of the forces mentioned above.

Consciousness of accountability after death for acts done *inter vivos*.

This was the influence of religion. The conviction of responsibility after death, of direct rewards and punishments in another world, "the conception of the individual, who was to suffer separately, and enjoy separately, was necessarily realized with extreme distinctness;" and it is not surprising to find that, in the struggle between communism and individuality, with this religious conviction in the background, communism had to make considerable concessions to individual rights.[1]

S'ráddha ceremonies reconciliatory of the struggle between the individual and the family for supremacy.

How to harmonize the corporate family existence with the heterogeneous phenomena of individuality was a problem which presented itself to the sages of antiquity for solution. The S'ráddha rites were happily hit upon, and there was again harmony in Hindu society.

By the institution of the S'ráddha ceremonies, a concession was made to the claims of individuality,

[1] Maine's Early Institutions.

and it had the effect of saving Hindu society from threatened dissolution. By this compromise the dignity of the individual was maintained, and his grievances, real or supposed, were removed without injury to the corporate existence of the family. By the institution of the S'ráddha rites, the indubitable title of the individual member to the love and gratitude of his children received social sanction, individuality was gratified, and Hindu society moved again in its usual course. Living in the midst of the joint family, the individual member could not indulge in the luxury of loving and being loved by his own children. The love he bore towards them was habitually controlled, and any outward expression of the inner feelings was condemned as unworthy of a member of the sacred institution of social communism. Filial affection and parental love must be totally eradicated, and all outward manifestations must be entirely controlled and replaced by the tyrannous regard for the all-absorbing interest of the joint family. So long as a man was alive and his children lived before his eyes, and he could watch over their welfare, if not outwardly, at least in his heart of hearts,—this in itself was a source of happiness, and it mattered not whether he gave outward expression to his affection, or the children to their love, gratitude, and respect, during his lifetime. He was conscious, at least so long as he lived, of loving and of being loved, and it consoled him in a measure for

LECTURE II. — his want of independence and liberty of action. But to be forgotten after death, to be denied the privilege of living in the hearts of his descendants, was a real hardship, and it was not unnatural that he should rebel against social authority, and claim his right to receive a tribute of respect from those he most loved—from those whose expression of gratitude and respect would gratify him most. When he left the world, and was gathered to his fathers, his children should perform his funeral obsequies, and mourn for their irreparable loss. On the anniversary of his death, again, every year, his children should pay a tribute of respect to his memory, and give alms to the poor, and make offerings to the deserving. On occasions of rejoicing, when every heart in the family was filled with joy, it was not unnatural that the departed father should claim a portion of the prevailing happiness, and should be honored and remembered in the midst of the festivities. On the All Souls' day of the Hindus, when autumn put on her gayest attire; "when the winds blew sweet, and the rivers flowed sweet; when the night was sweet, and the mornings passed sweetly; when the heavens were sweet, and the lords of day and night were sweet; when the kine were sweet, and the soil of the earth was sweet,"[1] the children of the deceased naturally longed to approach the spirit of their beloved father, and their father's father, with offerings which would be acceptable to them. This

All Souls' day of the Hindus.

[1] Rig-Veda, I, 90. 6—9.

is *Parvana S'ráddha*, the very cornerstone, as it were, of the Hindu Law of Inheritance.

LECTURE II.

Parvana Sraddha.

The original motive and the social necessity which dictated the S'ráddha rites have all been forgotten in the course of ages, and we saw that even in the age of A'pastamba a supernatural origin was ascribed to it. Social institutions never become deep-rooted in India unless they receive religious sanction, and unless religion invests them with a divine halo.

Religious sanction of sraddha rites.

The vocation of social philosophy is finished the moment religion steps in, and human eyes dare not pry into mysteries which have been declared by high authorities to be "unknown and unknowable." That social institutions are the products of social wants, and that they *grow* and are not made, is seldom taken into consideration; they soon become petrified by the irresistible action of religious influences, and acquire the strength of an obdurate mass of solidified rocks. The S'ráddha rites have gone through this process, and religious accretions have gathered round them, and religious motives have been freely attributed to them.

The popular notions concerning these ceremonies are based upon religious teachings, and it can be easily inferred that the obsequial rites are made largely to partake of the supernatural element. The spirits of departed ancestors will find no rest, but will for ever roam in the region inhabited by the ghosts of wicked men, unless S'ráddha rites are per-

LECTURE II. — formed for them. They sometimes take up their abode on housetops and on the branches of tall trees, and annoy their living kinsmen in every possible way, till the sacred pindas, prescribed in the Sastras, are offered to them in the holy shrine—in the presence of the great chastiser and saviour of wicked spirits—Gadadhara at Gaya.

Obsequial rites classified. Funeral rites are of three descriptions—the initiatory, intermediate, and the final.

1. Initiatory. The first are those which are observed from the burning of the corpse to the touching of holy water, weapons, &c., and the cessation of impurity caused by the death of a kinsman.

2. Intermediate. The *intermediate* ceremonies are the S′ráddhas which are performed during the first year after death, including the Sapindikarana, or the rites on the *first* anniversary of death.

3. Conclusive. The *final* rites are those which follow the Sapindikarana, when the deceased is admitted amongst the ancestors of his race, and the ceremonies are thenceforth general or ancestral.[1]

Their end and object: re-embodiment of the soul. The first set of funeral ceremonies are performed to effect by means of oblations the re-embodying of the soul of the deceased after burning his corpse. The intermediate rites are intended to raise his shade from this world, where it would else continue to wander among demons and evil spirits, up to the "ancestral region," and there deify him as it were among the

Elevation to heaven.

[1] Vishnu Purana, 318.

LECTURE II.

Association with the manes.

manes of departed ancestors. For this end, a S'ráddha should be offered to the deceased on the day after mourning expires; twelve other S'ráddhas singly to the deceased in twelve successive months; similar obsequies should be performed at the end of the third fortnight, and also before the expiration of the sixth month, and the exequial rites called Sapindikarana, on the first anniversary of death, complete the number sixteen of the *intermediate* S'ráddhas, whose apparent scope is to raise the shade of the deceased to heaven.[1] When the intermediate ceremonies are finished, the deceased, as we observed before, takes his proper place in the ancestral region of eternal bliss among his ancestors, and is for ever free from the woe, misery, and evils, incident to human nature. Those, however, who sought in this world the path of "emancipation," called *moksha*, and were free from "the bondage of works," attained "eternal beatitude," and were for ever absorbed into the essence of the Supreme Soul. The "ancestral region" was never meant for them; they attained a sphere of their own where there was neither happiness nor woe, anxiety nor desires. The residents of the "ancestral region," unlike these blessed spirits, were constantly dependent upon the *pindas*, or balls of food, offered by their descendants, and if the line of their issue failed, they had no longer the power of enjoying happiness, but were woe-stricken, and lost the happy abode. To guard against

Eternal beatitude.

Dwellers in "ancestral region" dependent upon *pindas.*

[1] Nirnaya Sindhu, Luck. Ed., p. 511. Asiatic Researches, Vol. VII.

LECTURE II.

Necessity for adoption.

such disastrous results, men, when alive, *adopt*, on failure of issue of their own body, the sons of near kinsmen, with the object of continuing their line of progeny, so that there may be an interminable succession of *pindas*, which the ancestors may live upon, till the time allotted to them in the "ancestral region" is finished.

Period of sojourn in the "ancestral region" determined by good or bad deeds on earth.

The acts, good or bad, which the *pitris* performed in this world, during their lifetime, determine their period of sojourn in the ancestral seat, and at the end of this period, they are born again into this world, and the circle of existence rolls on, till it can no longer be followed by the eye of reason.

Popular notion regarding the "*pitris*"

The prevailing ideas regarding the "ancestral region" and the *pitris*, its residents, are worthy of notice. The *pitris*, we repeat, are a race of divine beings, inhabiting celestial regions of their own, and receiving into their society the spirits of those mortals for whom the rite of fellowship in obsequial cakes has been duly performed. The *pitris* collectively, therefore, include a man's ancestors; but the principal members of this order of beings are of a different nature and origin. According to Manu, they were the sons of Marichi, Atri, Angiras, and the other Rishis or saints produced by Manu, the son of Brahmá, and from them issued the gods, demons, and men. The *Puranas* divide the *pitris* into seven classes, three of these are without form, or are composed of intellectual, not material substance, and

are able to assume what forms they please. The other four classes are corporeal. The world in which the *pitris* reside is called *pitri-loka*, or ancestral region, which is sometimes supposed to be the lunar sphere. According to the Puranas, however, it is below the heaven of Indra. The time at which the *pitris* are to be worshipped, the libations which they are to receive, the benefit which they derive from them, and the boons which they confer on the worshipper, are all minutely described in the *Puranas*, to which the curious, and historical inquirers may be referred for further information on these interesting points.[1]

and "*pitri-loka.*"

It follows from all that we have said before that the performance of the S'ráddha rites is the bounden duty of the sons and kinsmen of the deceased. Religion enjoins it, morality approves of it, and the sacred laws of the country give their most solemn sanction to it, and prescribe a severe penalty, in the shape of loss of inheritance, in case of omission or neglect. These S'ráddha rites, accordingly, form an essential part of the religious, moral, social, and legal codes of India; and a clear comprehension of them is absolutely necessary, therefore, to every student of law who would make a philosophical investigation regarding the principles upon which that law is based.

Sraddha rites form the essential elements in the religious and legal codes of India.

[1] Wilson's Vishnu Purana, 320.

LECTURE III.

NATURE OF SRADDHA RITES. PERSONS COMPETENT TO PERFORM THESE RITES.

Times for worship—Yajnawalkya's opinion—Vishnupurana—Neglect to give offerings to the manes an unpardonable sin—Sraddhas classified: 1. Nitya—2. Kamya—3. Gosthi—4. Suddhi—5. Karmanga—6. Daiva—7. Yatra—8. Pushti—9. Vriddhi—10. Naimityika—11. Sapindikarana—12. Parvana—Rites essentially the same—Difference in details of procedure—Not of importance from a legal point of view—Vriddhi Sraddha described—Occasions of its performance — Procedure —Its other names—Abhyudayika—Nandimukha — Ekoddishta Sraddha—Described in the Vishnupurana —Its historical interest—Sapindikarana—As described in the Vishnupurana—Its effects: the union and fellowship of the deceased with his immediate ancestors — Prayers offered up at Sapindikarana — Parvana Sraddha—Procedure described—Invocation of gods—Invitation of the manes—Welcome offerings—Oblation to fire, and the Moon — Consecration of the residue—Offering of funeral cakes to the three paternal and maternal ancestors—Homage paid to remoter ancestors—Libations of water—Disposal of cakes —Dismissal of the manes—Circumambulation—Songs of the *pitris*—Oblations occasionally offered to the wives of the paternal and maternal ancestors—Competency of persons to offer oblations determined by fixed rules —Inefficacy of offerings made by blood-relations in contravention of the rules — Rules taken from Vishnupurana — Dictum as to competency of daughter's grandson not followed — Paramount authority of the Mitakshara—Dharma Sindhu Sara on the order of succession of blood-relations entitled to perform sraddha—Son—Eldest to the exclusion of others—Sons separately—Younger son—Adopted son—Grandson and great grandson—Widow (in case of deceased being a male)—Co-wife's son, and then husband (in case of deceased being a female)—Daughter—Daughter's son—Uterine brother—Half-brother—Brother's son—Father, mother, daughter-in-law, sister—Sister's son—Father's brother, his son, and other sapindas —Samanodakas—Kinsmen of the same gotra—Maternal relatives—Father's and mother's sister's son—Father's bandhus—Mother's bandhus—Disciple—Son-in-law—Friend—Any person taking the property (in case of the deceased being a Bramhin)—Natural father of an adopted son entitled to

pinda—Rules for Sraddha of a deceased female—Initiatory funeral rites obligatory—Intermediate ones optional—Final ones compulsory on the inheritor of property—Final rites for a woman performed only on the anniversary of her death—Rules for Mithila school—In case of females—Bengal School—Rules for Bombay school taken from Nirnaya Sindhu—Persons entitled to pindas according to Nirnaya Sindhu—Pindas offerable by females to certain specified persons only—Libations of water offerable promiscuously by kinsmen—Persons entitled to pindas have a right to libations—Remote ancestors entitled to libations only—Rules regarding impurity determine proximity of kinship—Effects of impurity—Importance of the rules—Gautama—Suddhi Tatwa (Mithila school)—Sraddha ceremonies serve as a key to the Hindu Law of Inheritance—Spiritual benefit the criterion of the right of inheritance—The principle strictly true in the case of the Bengal school.

Times for worship.

LET us examine to-day the nature of the Sraddha ceremonies, and enquire who are those privileged persons that are competent to present the exequial cakes to their deceased kinsmen.

You must know first of all that the manes cannot be worshipped at all times of the year. There are appointed periods during which alone offerings can be presented to them. The seasons proper for such worship have been defined with a minuteness and precision, which show the extreme solicitude of the Hindus in all matters relating to the last act of duty which they owe to their ancestors. Yajnavalkya mentions the following seasons as sacred to Sraddhas performed in honor of ancestors collectively :—

1. The day of the new moon, when the sun and moon are in conjunction.

2. The eighth lunar day of the dark half of a month.

According to Raghunandana, the standard authority in all ceremonial matters in the Bengal school,

LECTURE III. there are only three such sacred days in the calendar—in the months of Agrahayana, Magha, and Phalguna. According to the Mitakshara, however, there are four such days in the course of the year; there being one on the eighth of the moon's wane in each of the four winter months.

3. Any auspicious occasion, as the birth of a child, or the marriage of a daughter.

4. The dark fortnight of the month of Aswina, thence called *pitripaksha*, or the fortnight especially sacred to the manes.

5. The summer and winter solstices.

6. The day when the sun enters into a new sign; or

7. When he reaches the equinoctial line.

8. When the moon reaches the seventeenth division of her path, technically known as *vyatipata*.

9. When the moon is in *magha*, the 10th lunar asterism, and the sun in *hasta*, the 13th lunar mansion.

With reference to this particular period, Manu says "Whatever pure food, mixed with honey, a man offers to the manes on the thirteenth day of the moon, in the season of rain, and under the lunar asterism *magha*, has a ceaseless duration."[1] The offerings on this occasion must have been considered to be particularly efficacious, for the oblations given on this occasion sustained and refreshed the *pitris* through the countless ages of eternity.

[1] Manu III, 273.

LECTURE III.

10. Eclipses of the sun and moon.

Yajnavalkya's opinion.

Yajnavalkya adds, that the ancestral offerings are not to be limited to these occasions alone, but whenever the heart yearns for a meeting with our ancestors,—whenever we feel prompted by gratitude and affection to make offerings to the spirits of our parents and kinsmen,—whenever good and wise men honor our residence with a visit, and we have the means by which we can accomplish our earnest desire,—*Sraddhas* should be performed without hesitation in honor of those who were honored during life, and whose shades ever look to us for spiritual food and nourishment.

Vishnu-purana.

The following passages, quoted from Vishnu-purana,[1] determining the proper seasons during which ancestral Sraddhas should be performed, may be read with interest. They embody the remarks made by Yajnavalkya, and give additional information on this subject.

"Whenever a householder finds that any notable circumstance has occurred, or a distinguished guest has arrived, on which account ancestral ceremonies are appropriate, he should celebrate them. He should offer a voluntary sacrifice upon any atmospheric portent, at the equinoctial and solstitial periods, at eclipses of the sun and moon, on the sun's entrance into a zodiacal sign, upon unpropitious aspects of the planets and asterisms, on dreaming

[1] V. P., 322.

LECTURE III.

unlucky dreams, and on eating the grain of the year's harvest. The third lunar day of the month of Vaisakha (April-May), and the ninth of Kartika (October-November), in the light fortnight, the 13th of Nabha (July-August) and the 15th of Magha (January-February) in the dark fortnight, are called by ancient teachers the anniversaries of the first day of a *yuga*, and are esteemed most sacred. On these days water mixed with sesamum seeds should be regularly presented to the progenitors of mankind; as well as on every solar and lunar eclipse; on the eighth lunations of the dark fortnights of *Agrahayna*, *Magha*, and *Phalguna* (December—February); on the two days commencing the solstices, when the nights and days alternately begin to diminish; on those days which are the anniversaries of the beginning of the *manvantaras* (or reign of Manus); when the sun is in the path of the goat; and on all occurrences of meteoric phenomena."[1]

Neglect to give offerings to the manes an unpardonable sin.

There are thus, the wise have calculated, *ninety-six*[2] different occasions in the course of the year,

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[1] The *Dewali* (dípálí—dipánvitá), new moon, is known in common *parlance*, in Bengal, as "muchi amábasyá." On this day, even the *muchis*, the lowest of the low in the social scale, must, if he would claim the name of a Hindu, celebrate the *parvana* rites in honor of his paternal and maternal ancestors. Ninety-nine per cent of orthodox Hindus perform *Parvana* Sraddha on this occasion. The *Dewali* feast for the dead is thus almost universally observed. Two in a hundred celebrate for fifteen days the *parvana* rites in the dark fortnight of *Asvina;* thirty per cent. for three days ; fifty for two days ; and sixty for one day only.

[2] अमा मनु-युग-क्रान्ति-धृति-पात-महालयाः ।
अन्वष्टक्यन्तु पूर्व्वेद्युः षड्नवत्यः प्रकीर्त्तिताः ॥

when the manes can be honored collectively, and when the debt of filial gratitude can be discharged by the children and the children's children. The ancestral Sraddhas are held to be of such uncommon solemnity, that they are considered to be, by the writers on sacred law, of even greater importance than the offerings due to the gods.[1] There is a common saying among us that a man may be pardoned for neglecting *all* his social duties, but he is for ever cursed if he fails to perform the funeral obsequies of his parents, and to present them with the offerings due to them. This feeling may be condemned by the utilitarian matter-of-fact philosophers of the present day, but it will ever continue to be honored by the priests of "humanity" in all ages and countries.

Sraddhas classified.

There are twelve classes of *Sraddhas*.[2] They are as follows:—

1. Nitya.

1. The *Nitya*, or constant. These are daily offerings of food or water to the manes in general. The three immediate ancestors with their wives have also a share in the offerings given. This is one of the five great sacraments which must be performed day by day.

2. Kamya.

2. The *Kamya*, or voluntary, performed for the accomplishment of a special design.

3. Goshthi.

3. The *Goshthi*, for the advantage of a number

[1] Manu, III, 203.

[2] Nirnaya Sindhu, 308; Vishnu Purana, 314; Cole. Mis. Essays, Vol. II, 196.

LECTURE III. of learned persons, or of an assembly of Brahmans, invited for the purpose.

4. Suddhi. 4. The *Suddhi*, or purificatory; one performed to purify a person from some defilement;—an expiatory Sraddha.

5 Karmanga. 5. The *Karmanga;* one forming part of the initiatory ceremonies, observed at conception, birth, tonsure, &c. This is preparatory to the celebration of any solemn rite, and is considered as a part of such rite.

6. Daiva. 6. The *Daiva;* to which the gods are invited, and which is held in honor of deities.

7. Yatra. 7. The *Yatra* Sraddha; held by a person previous to the undertaking of a distant journey.

8. Pushti. 8. The *Pushti* Sraddha; one performed to promote health and wealth.

9. Vriddhi. 9. The *Vriddhi*, or festive Sraddha, held on occasions of rejoicing.

10. Naimityika. 10. The *Naimityika*, or occasional; the ceremonies in honor of a kinsman recently deceased. It is known by the name of *Ekoddishta*, which term is also applied to the Sraddha rites held on the anniversary of the death of a person.[1]

[1] The first sixteen funeral repasts taking place after the ten days immediately succeeding the day of death (?), as well as that on the anniversary of such day, are *Ekoddishta*. On these occasions, the following articles are first presented in honor of the deceased—raw rice, liquid butter, honey, barley, soaked peas, fruit, water, frankincense, white flowers, *kusa* grass, a lamp, sandal-wood, betel, cloth, a thread, and water for the feet. The oblation of the funeral cake then takes place.—*Suth. Dattaka Mimansa*, Sec. IV, 74, note.

11. The *Sapindikarana*, or the *first* anniversary Sraddha.[1]

12. The *Parvana*, or *ancestral* Sraddha.[2]

LECTURE III.

11. Sapindikarana.

12. Parvana.

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[1] "The ceremony of *Sapindikarana*, or rite of associating the deceased with the manes of departed ancestors. It should strictly take place on the (first) anniversary of the day of death, but is more usually performed at the funeral repast of the thirteenth day from the decease (?) Previous to its performance, the deceased is not denominated a *pitri*, or departed ancestor. This rite consists in the following ceremonials: Four vessels called '*puti*,' each of two leaves, are prepared. These are filled with water for the feet, scented wood, flowers, sesamum seed, and consecrated severally to the deceased and three nearest departed ancestors on the father's side. The contents of that consecrated to the deceased, with the exception of a small part, is poured out in equal portions into the other three, with recitation of the two prayers commencing "*Ye samana*," &c. Then the observances of the *Ekoddishta* and *Parvana* rites, with the variations necessary, take place, the same prayers being recited;—that is, those of the former rite are performed in honor of the deceased, and those of the latter in honor of the three ancestors abovementioned. Of the four funeral cakes which would be thus offered severally to the deceased and the three ancestors in question, that consecrated to the deceased is divided into three parts, one of which is admixed with each of the other three cakes. It is from this that the ceremony takes its name. The portion of the contents of the '*puti*' consecrated to the deceased, which is reserved, is for the purpose of being presented to deceased, amongst the other articles, the oblation of which is part of the *Ekoddishta* rite, required to be performed in his honor."—*Suth. Dattaka Mimansa*, Sec. VI, 35, note.

[2] "The *Parvana*, or double rite, consists in the same oblations (as in the *Ekoddishta*) and other ceremonials being celebrated on the death of the father and other sire, in honor of the ancestors on the father's side, as well as those on the mother's side. Thus, besides the articles mentioned above (in the description of *Ekoddishta*), a funeral cake is offered to each of the three nearest deceased male ancestors on the father's side and mother's side.

"The oblations in honor of the ancestors on either side are preceded by a *Visvadeva* offering. The term *Visvadeva* denotes a certain set of divinities collectively, and the offering so called is in their honor, and consists of the different articles above enumerated: these should also be presented, both on the occasion of a *Parvana* and *Ekoddishta* rite, to the lord of the soil.

"Rites in the form of *Parvana* are celebrated by a rigid Hindu on the following occasions:—On the last day of every moon (*Amábasyá*) on the eighth and ninth days of the dark fortnights of *Pausha*, *Mágha*,

LECTURE III.

The last four classes are considered to be the most solemn. All the others may be omitted, but these four must on no account be neglected by a faithful Hindu.

All these different descriptions of Sraddha may,

Phalguna, and *A's'wina*, when oblations are made in honor of the mother and two nearest deceased female ancestors in the line of the father; on the full moon of *Mágha;* during the whole of the first fortnight of *A's'wina*, which is denominated 'pitripaksha,' as peculiarly set apart for the performance of rites in honor of ancestors; and particularly on the thirteenth of this month; on any day of *Agraháyana*, previous to using the rice of the new crop; in *Vaisákha*, at the time when the grain ripens; in *A'shára*, for the rains: when the sun enters the constellation *A'rdrá;* on occasion of eclipses; and visiting places of pilgrimage."—*Suth. Dattaka Mimansa*, Sec. IV, 72, note.

"During the first half of the month of *A's'wina*, *Parvana* rites are celebrated, whereat the solemnities observed in honor of paternal ancestors are observed also in honor of maternal. But it is ordained, that where the father may have died during this fortnight, on the anniversary of the day of his death, instead of the usual *Ekoddishta*, or rite dedicated to him alone, the same ceremonials of a *Parvana* rite shall be performed as would have been celebrated in honor of the father and his two ancestors, had the anniversary of his decease not fallen within this fortnight: but a *Parvana* rite shall not be commenced, for the sake of the solemnities, which, on this supposition, would have been observed in honor of the three maternal ancestors; for, the commencement of these is held to be subordinate to, and to depend on the same solemnities in honor of the paternal ancestors, which would have already been especially performed. The main object of performing a real *Parvana* rite is the celebration of solemnities in honor of the paternal ancestors."—*Suth. Dattaka Chandrika*, Sec. I, 24, note.

"*Parvana Sraddha* :—This ceremony consists in the presentation of a certain number of oblations,—namely, one to each of the first three ancestors in the paternal line and maternal line respectively; or, in other words, to the father, the grandfather, and the great grandfather in the one line, and the maternal grandfather, the maternal great grandfather, and the maternal great great grandfather in the other."—5 B. L. R., 40.

"*Parvana* :—A *S'raddha* with a double set of funeral cakes: three cakes are offered to the father, paternal grandfather, and great grandfather; and three to the maternal grandfather, his father, and his grandfather; and the crumbs of each set to the remoter ancestors, paternal (and maternal ?)."—2 Cole. Dig., 339.

according to the Mitakshara, be reduced to *two* classes: Parvana, or ancestral; Ekoddishta, or individual.[1] As all the exequial rites are intended either for ancestors in general, or for a single individual in particular, the classification of the Mitakshara is philosophically correct. Vridhi S'raddha, for example, is an ancestral or *Parvana* Sraddha; and Sapindikarana is individual. The daily funeral repast, and the festive repast, etc., are merely variations of the *Parvana* rite.

LECTURE III.

We shall briefly describe the Sraddhas known as *Vriddhi*, *Ekoddishta*, and *Sapindikarana ;* and give a fuller account of Parvana Sraddha, it being especially important from a legal point of view. In fact, a description of one class of *Sraddhas* will convey a clear idea of the ceremonies observed in all the other classes. The rites are essentially the same, and the prayers and hymns repeated from the Vedas are also mostly the same. The difference in the procedure of the ceremonies is but slight, and to a general reader is of no consequence. No legal importance, also, is attached to the *manner* in which the ceremonies are performed, and we will not, therefore, tax your patience by giving a detailed description of all the ceremonies observed on these occasions. Their name is legion, and a full account of all of them would fill a large volume. The Hindu ceremonial writers have displayed such a vast amount of

Rites essentially the same.

Difference in details of procedure.

[1] Mitakshara, I., 216.

LECTURE III.

erudition in the treatment of this subject, as clearly to show that the importance attached to it was exceedingly great, and those who could throw any additional light on such matters were held in universal respect. Fortunes are sometimes lavished away in celebrating with pomp the *Sraddha* of an ancestor, thousands of persons receive food and alms, and learned Brahmans from all parts of the country are invited and honored with liberal donations on these occasions. It is not wonderful, therefore, that the learned in India, to whom the Sraddha ceremonies are a source of great profit and emolument, and to whom the knowledge of their true nature is entrusted as a sacred treasure, should guard them with jealousy, and add on every possible occasion to the stock of information which has already been collected.

Not of importance from a legal point of view.

There are differences in all the ceremonial schools in the mode of procedure, but they are not material, and need not, therefore, be noticed. The honouring of the deceased ancestors is the chief object aimed at in these ceremonies, and as soon as we gain a clear insight into their general nature, our interest ceases, and we leave the further treatment of the Sraddha ceremonies to the ceremonial writers of India, who delight in unravelling the mysteries attached to the ancestral rites.

Vriddhi Sraddha described.

Vríddhi, or festive Sraddha:—The ceremonies proper for this *Sraddha* are to be performed on occasions of rejoicing, or on an accession of good fortune. When

every heart in the family beats with joy, when all the descendants of a common ancestor are engaged in festivities, they naturally wish that their dead parents, and others who, during life, were sharers in their happiness, should partake in *spirit* of some portion at least of the universal joy. Sacred ceremonies are, therefore, held in their honor. They are generally performed on the birth of a son, or the marriage of a son or daughter; on entering a new dwelling, or on tonsure of a youthful member of the family. When the invited Brahmans are seated, and the family priest has arranged in due order the necessary materials for the sacrifice, the sacrificer, clothed in white garments, having put a ring of kusa grass on his finger, touches in humble obeisance his right knee—which corresponds to kneeling in the west—makes a solemn declaration that it is his duty that day to honor his paternal father, grandfather, and great grandfather, and the three maternal ancestors, all with their wives; and as soon as permission is given to him by the assembled guests, he invokes the presence of the deities and the spirits of the ancestors. The Vriddhi Sraddha being essentially a Parvana Sraddha, the prayers and hymns appropriate to the occasion, and which, as we remarked before, are almost the same word for word as in the other Sraddhas, are repeated, and offerings made of curd, honey, ghee, and barley, are duly presented to the manes. The female ancestors do not in any manner

LECTURE III.

Occasions of its performance.

Procedure.

LECTURE III.

play a secondary part in this ceremony; they share with their respective husbands the offerings of food, and their names may also be separately mentioned in the course of the ceremonies.[1] This Sraddha is also known as *Nandimukha* or *Abhyudayika.*[2] The word *Abhyudaya* has the same signification as *Vriddhi*, prosperity or festivity, and the two, therefore, are identical. But the word *Nandimukha* is used in a different sense. The term is applied to the rites themselves, because a certain class of progenitors, the residents of the "ancestral region," are especially invoked on this occasion. According to the authorities quoted in the Nirnaya Sindhu, these beings are addressed both as *pitris* and gods; being in the former case either the ancestors prior to the great grandfather, ancestors collectively, or a certain class of them; and in the latter being identified with the *vishvadevas*, or the assembled gods.

Its other names.

Abhyudayika.

Nandimukha.

Ekoddishta Sraddha

Ekoddishta:—The ceremonies performed for a person recently deceased are called after this name. These ceremonies are held in honor of a *single* individual, and are, therefore, known as *ekoddishta*: *Eka*, one, and *uddish*, to refer to. All the Sraddha rites which refer to *one* person only would be called by this

[1] The followers of the Yayur-Veda *only* present separate *parvana* pindas to paternal female ancestors.

[2] *Nandimukha* (a Parvana Sraddha)—a Sraddha on joyous occasions in which nine balls of rice are offered to the father, paternal grandfather, and great-grandfather; maternal grandfather, great-grandfather, and great-great-grandfather; and to the mother, paternal grandmother, and paternal great-grandmother:" 2 Cole. Dig., 365.

name. All the sixteen *Sraddhas* mentioned before, which are performed during the first year after death, and all the ceremonies which are performed on the anniversary of a person's death, are classed under this head. The *first* anniversary rites are *not* included in this category; there is a different term for those ceremonies, which we will presently describe.

Described in the Vishnupurana.

With reference to the *ekoddishta*, or anniversary rites, the *Vishnupurana* says :—

"The Sraddha enjoined for an individual is to be repeated on the day of his death, but without the prayers and rites performed on the first occasion, and without offerings to the *vishvadevas* (or assembled gods). A single ball of food is to be offered to the deceased, intended for the purification of one person, and Brahmans are to be entertained."[1]

The sacrificer turning his face towards the south presents offerings to the deceased, and repeats the following prayer :—"Those of my ancestors and kinsmen who have been consecrated by the purifying flames of fire, as well as those who have not been able to enjoy this sacred rite, let all, all of them be gratified by the offerings I present to them on the ground, and attain the regions of eternal bliss." He then offers a libation of water to the deceased. As the water flows in a continuous stream, the sacrificer goes on repeating the following *mantra* :—" Here is food for you : you are not an isolated being, but

[1] V. P., p. 317.

LECTURE III.

are an intimate bond of union between me and my ancestors who preceded you, and the descendants who have followed you. Here is food for you."

Its historical interest.

From a historical point of view, the Ekoddishta Sraddhas are very important. These were probably the *Sraddhas* which were first instituted, the others being only subsequent improvements. The deceased parents or dear kinsmen whose loss was deeply deplored must have been the first objects of the Sraddha rites, and it must have been long after the institution of this ceremony that the *Parvana Sraddha* was developed. If we are to believe the Pauranic legend, the first Sraddha rites were performed for a deceased son,[1] and not for an ancestor. Be that as it may, the individual Sraddha occupies an important place as a social and religious institution, and its celebration is attended with a solemnity and a lavish expenditure of worldly substance which do not belong to the other ceremonies.

Sapindikarana.

Sapindikarana:—This is the first anniversary Sraddha, consisting of offerings to an individual, and intended to introduce the shade of a deceased kinsman to the rest of the manes. This is an important ceremony for the peace of the soul of the deceased. So long as this rite is not performed, the spirit of the departed ancestor is unable to find an entrance into the "ancestral region," and take his proper place among the manes of the other ancestors. It is abso-

[1] Varaha Purana, Ch. on Sraddha.

lutely necessary, therefore, to perform this ceremony.

LECTURE III.

After the Sapindana rites are performed, the deceased becomes in a way independent of the sacrificer, for even if his immediate descendant fails afterwards to offer him food and water, he may have his share in the offerings given, by remote members of the family, to ancestors and kinsmen in general.

As described in the Vishnupurana.

We quote again from the Vishnupurana:[1]

"The practices of this rite are the same as those of the monthly obsequies, but a lustration is to be made with four vessels of water, perfumes, and sesamum. One of these vessels is considered as dedicated to the deceased, the other three to the progenitors in general; and the contents of the former are to be transferred to the other three, by which the deceased becomes included in the class of ancestors to whom worship is to be addressed with all the ceremonies of the Sraddha."

It effects the union and fellowship of the deceased with his immediate ancestors.

The *Sapindana* is a process of combination. On the first anniversary of death, the balls of food offered to the deceased individually and collectively are blended together, and thus the ancestor, in whose honor the ceremony is specially held, is made to form a link in the chain of other ancestors. This is the rite of fellowship, the mysterious tie which binds the deceased with all the other departed spirits. "Four funeral cakes are offered to the deceased and his three ancestors, that consecrated to the deceased being di-

[1] V. P., 318.

LECTURE III.

vided into three portions and mixed with the other three cakes." The portion retained is then offered to the deceased, and the act of union and fellowship becomes complete.

Prayers offered up at Sapindikarana.

As the sacrificer arranges the four vessels mentioned above, he must repeat the following prayers :—

"Hail to the 'ancestral region' where my fathers reside, who are of exalted minds, and who during their lifetime were kind to every creature on earth. Here is food for them. Adoration to them. Let this sacrifice be offered to these divine beings."[1]

"Those who are dear to me, and are yet alive; those who are kind-hearted, and are animated by kind and exalted feelings, may they bless me for a hundred years in this world with happiness and joy."[2]

The other prayers and hymns are mostly the same as in the Parvana Sraddha. At the conclusion of the ceremony the Brahmans are prayed to bless the sacrificer: "May generous givers abound in our house; may the Scriptures be studied, and progeny increase in it; may faith never depart from us; and may we have much to bestow on the needy."[3]

Parvana Sraddha.[4]

Parvana Sraddha.

It will be necessary now to describe the Sraddha which is performed in honor of progenitors in general, and at which three funeral cakes are offered

[1] White Yaju, 19. 45.

[2] *Ibid*, 19. 46.

[3] Manu, III, 259 ; Yaj. I, 245.

[4] Colebrooke's Mis. Essays, Vol. II, p. 166.

to three paternal ancestors, as many to three maternal ancestors, and two to the Visvadeva or assembled gods.

Procedure described.

The person who performs the ceremony, after placing the implements and materials in regular order, solemnly declares his intention of performing a Sraddha, and the motive for celebrating the rites. He then proceeds to invite and to welcome the assembled gods and the manes.

" First he places two little cushions of *kusa* grass on one side of the altar for the Visvadevas, and six in front of it for the pitris.

" After strewing *kusa* grass on those cushions, he asks, ' Shall I invoke the assembled gods?'

Invocation of gods.

" Being told, ' Do so,' he thus invokes them: ' Assembled gods! hear my invocation; come and sit down on this holy grass.' After scattering barley on the same spot, he meditates this prayer: " Assembled gods! listen to my invocations, ye who reside in the sky; and ye who abide near us on earth, or far off in heaven; ye whose tongues are fire; and ye who defend the funeral sacrifice, sit on this grass and be cheerful."

Invitation of the manes.

" He then invites the manes of ancestors with similar invocations: " O fire! zealously we support thee; zealously we feed thee with fuel; eagerly do thou call our willing ancestors to taste our oblations. May our progenitors, who drink the juice of the moon-plant, who are sanctified by holy fire, come by paths

LECTURE III.

which gods travel. Satisfied with ancestral food at this solemn sacrifice, may they applaud and guard us."

Welcome offerings.

"He next welcomes the gods and the manes with oblations of water, &c., in vessels made of plantain leaves. Two are presented to the Visvadeva, and *three* to paternal ancestors, and as many to maternal forefathers. The water of each vessel is successively poured into a Brahman's hand, and the empty vessels are piled up in three sets. The performer of the Sraddha reverses them, saying, while he upsets the first, "Thou art a mansion for ancestors."

Oblation to fire

"He next takes up food smeared with clarified butter, and makes two oblations to fire, reciting these prayers: "May this oblation to fire, which conveys offerings to the manes, be efficacious." "May this oblation to the moon, wherein the progenitors of mankind abide, be efficacious."

and the moon.

Consecration of the residue.

"Brahmans should be fed with the residue of the oblation; it is accordingly consecrated for that purpose by the following prayer: "The vessel that holds thee is the earth; its lid is the sky; I offer this residue of an oblation, like ambrosia, in the undefiled mouth of a priest: may this oblation be efficacious." The performer of the Sraddha then points with his thumb towards the food, saying, "Thrice did Vishnu step, and at three strides traversed the universe; happily was his food placed on this dusty earth. Be this oblation efficacious." He

adds, 'May the demons and giants that sit on this consecrated spot be dispersed.' He meditates the *Gayatri*, which has been thus paraphrased: 'Om! Let us adore (not the visible material sun), but that incomparably greater light, which illumines all, delights all, from which all proceed, to which all must return, and which alone can irradiate (not our visual organs merely), but our souls and our intellects.' He then sweetens the food with honey or sugar, saying, 'May the winds blow sweet, the rivers flow sweet, and salutary herbs be sweet unto us; may nights be sweet, may the mornings pass sweetly; may the soil of the earth, and heaven, parent of all productions, be sweet unto us; may Soma, king of herbs and trees, be sweet; may the sun be sweet; may the kine be sweet unto us.' The food is then distributed among Brahmans.

Offering of funeral cakes to the three paternal and maternal ancestors.

"He now proceeds to offer the funeral cakes, consisting of balls or lumps of food mixed with clarified butter. He offers three to the paternal forefathers, as many to the maternal ancestors, and two to the Visvadeva. The following prayers are repeated: 'May those in my family who have been burnt by fire, or who are yet unburnt, be satisfied with this food presented on the ground, and proceed contented towards the path of eternal bliss. May those who have no father, nor mother, nor kinsman, nor food, nor supply of nourishment, be contented with this food offered on the ground, and attain a

LECTURE III.

happy abode.' 'Ancestors, rejoice, take your respective shares, and be strong as bulls.'

Homage paid to remoter ancestors.

"He then wipes his hand with *kusa* grass in honor of remoter ancestors, who thus become partakers of the oblations.[1]

Libations of water.

"In the next place, he makes six libations of water from the palms of his hands with salutations to the gods of the six seasons.[2]

Disposal of cakes.

"The performer of the Sraddha then takes up the cakes successively, smells them, throws them into a vessel, and gives away the food to a mendicant priest or to a cow, or else casts it into the waters.

Dismissal of the manes.

"He then dismisses the manes, saying, 'Fathers, to whom food belongs, guard our food and the other things offered by us; venerable and immortal as ye are and conversant with holy truths, quaff the sweet essence of it *(Soma)*, be cheerful, and depart contented by the paths which gods travel.'

Circumambulation.

"Lastly, he walks round the spot and leaves it, saying, 'May the benefit of this oblation accrue to me

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[1] The wipings or the crumbs of *pindas* (lepa), are offered to the *paternal ancestors* alone. The maternal ancestors are not partakers of these divided oblations. Raghunandana says:—

पितृपत्तस्तद्भेषु करमार्ज्जनं लेपभागिनो वृद्धप्रपितामहादींस्त्रीनुद्दिश्य कर्त्तव्यम्... अतो मातामहपक्षे न करमार्ज्जनम् ।

(Ragh. S'ra. Tat. 113: see also Nirnaya Sindhu, 379; Manu, III, 216) On the day of the full moon in the month of Bhadra, a *separate S'raddha* is performed in honor of the 4th, 5th, and 6th paternal male ancestors. This is the only occasion on which their memory is honored separately by their descendants. On all other occasions they only partake of *divided* oblations in the *Parvana* Sraddhas. (Nir. Sindhu, 120.)

[2] Manu, 3. 217.

LECTURE III.

repeatedly; may the goddess of the earth, and the goddess of the sky, whose form is the universe, visit me with present and future happiness. Father and mother! revisit me (when I again celebrate such rites). Soma, king of the manes! visit me for the sake of conferring immortality.'"[1]

Songs of the *pitris*.

I will conclude this description of the Parvana Sraddha by the following songs of the Pitris: "That enlightened individual who begrudges not his wealth, who presents us with cakes, shall be born in a distinguished family. Prosperous and affluent shall that man ever be, who in honor of us gives to the Brahmans, if he is wealthy, jewels, clothes, land, conveyances, wealth, or any valuable presents; or who, with faith and humility, entertains them with food, according to his means, at proper seasons. If he cannot afford to give them dressed food, he must, in proportion to his ability, present them with unboiled grain, or such gifts, however trifling, as he can bestow. Should he be utterly unable even to do this, he must give to some eminent Brahman, bowing at the same time before him, sesamum seeds adhering to the tips of his fingers, and sprinkle water to us from the palms of his hands upon the ground; or he must gather, as best he may, fodder for a day, and give it to a cow; by which he will, if firm in faith, yield us satisfaction. If nothing of this kind is practicable, he must go to a forest, and lift up his arms to

[1] Asiatic Researches, Vol. VII.

LECTURE III.

the sun and other regents of the spheres, and say aloud—I have no money, property, grain, or anything whatever fit for an ancestral offering. I bow, therefore, to my ancestors, and hope the progenitors will be satisfied with these arms tossed up in the air in devotion."[1]

Oblations occasionally offered to the wives of the paternal and maternal ancestors.

"A Sraddha is thus performed, with an oblation of three funeral cakes only to three male paternal ancestors on some occasions; or with as many funeral oblations to three maternal ancestors also on others.[2] Sometimes separate oblations are also presented to the wives of the paternal ancestors; at other times, similar offerings are likewise made to the wives of three maternal ancestors. Thus, at the monthly Sraddhas celebrated on the day of new moon, six funeral cakes are offered to three paternal and as many maternal male ancestors with their wives: on most other occasions separate oblations are presented to the female ancestors."[3]

There is some difference of opinion as to whether female maternal ancestors are entitled to *separate* offerings. It is beyond question, however, that they

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[1] Vishnupurana, 323.

[2] On the first day of the light fortnight in the month of *Asvina* the sons of daughters are competent to celebrate *Parvana* solemnities in honor of their maternal male ancestors, even in presence of their maternal uncles. The sons of daughters perform this S'raddha on this occasion in honor of their maternal ancestors *only*, as it is specially dedicated to maternal ancestors alone. It is, therefore, called, दौहित्रश्राद्ध. (*Nirnaya Sindhu*, p. 134).

[3] Asiatic Researches, Vol. VII.

LECTURE III.

are benefited by the *pindas* which are presented to their husbands, and are *joint* partakers of the oblations which are offered to their husbands.[1] The weight of

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[1] (*a*) The Dharma Sindhu says :—" The *Parvana* S'raddha is of three descriptions. It may be (1) with *a single* set of oblations in honor of the three paternal ancestors only, as on the anniversary of their death ; (2) with a double set of oblations in honor of the three immediate paternal, and the three immediate maternal ancestors, as the daily S'raddhas, and the *ninety-six* S'raddhas on the day of the new moon and other similar occasions ; (3) with a triple set of oblations in honor of the three paternal ancestors with their wives, and the three maternal ancestors with their wives, as (अन्वष्टकाश्राद्ध) on the 9th lunar day in the dark fortnight in the months of *Pausha, Mágha, Phalguna,* and A'swina. The S'raddhas performed in the dark fortnight in the month of A'swina, as well as those celebrated in holy places, are of a mixed character. The *Parvana* and the *Ekoddishta* rites are combined in them —*parvana* rites for male ancestors, and *ekoddishta* for their wives. Some say, *parvana* ceremonies should be performed on these occasions for maternal male ancestors, and maternal female ancestors, separately, and not jointly as at other times. They are of opinion that these S'raddhas (महालयादिश्राद्ध and तीर्थश्राद्ध) should be entitled *Parvana* with a quadruple set of oblations." (*Dharma Sindhu,* Book III, Ch. 2, p. 7).

(*b*) " In ordinary *Parvana* S'raddhas," says the Mitakshara, " no ceremonies are separately performed for female ancestors." *Mita.* I, 252-253. " But in Vriddhi S'raddhas, S'atatapa ordains that the first set of rites should be in honor of female ancestors, the second set of ceremonies are intended for the three immediate paternal male ancestors, and the third set for the maternal male ancestors." *Mita.* I, 249.

(*c*) " There is some difference of opinion," says the Nirnaya Sindhu, " with regard to the *separate* celebration of *parvana* solemnities in the case of female ancestors. S'ankhyayana ordains that *pindas* should be offered on these occasions first to the male ancestors (paternal and maternal), then to the paternal female ancestors, then to the maternal female ancestors. According to some, then, in the Mahálaya S'raddha, and in S'raddhas performed in holy places, only *nine* oblations should be offered (*viz., three* to the three immediate paternal ancestors, *three* to the three maternal ancestors, and *three* to the three paternal female ancestors) ; and according to others, again, twelve such oblations should be offered. In this case the three additional oblations are presented to the three immediate maternal female ancestors. There are teachers also who maintain that no separate oblations should be given to the female ancestors. In their opinion, the wives of the ancestors are inseparably joined with their

LECTURE III. authority is against the claim of maternal female ancestors to *separate* presentation to them of *parvana*

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husbands in the solemnities, and the wives share the oblations with their husbands, and are not entitled to oblations *separate* from those of their husbands." *Nirnaya Sindhu*, 379.

(*d*) Speaking of the benefits conferred by the sons of daughters on their maternal female ancestors, Jagannatha says:—

"S'atatapa.—After the first annual obsequies by the *Sapindas*, whatever is given *at the monthly rites* to ancestors *by the son of the deceased*, his mother has a share of the benefit: this is a settled rule in all systems of religious and civil duties.

"If it be argued from this text of law cited by Raghunandana, that a daughter's son also confers benefits on his maternal grandmother, because she has a share of the funeral cake offered to his maternal grandfather, since the word 'ancestors' (literally fathers) intends three paternal and three maternal forefathers, namely, the father and the rest, and the maternal grandfather and so forth; and the word 'mother' intends three female ancestors ascending from the mother, and three other female ancestors ascending from the maternal grandmother; *these lawyers* reply, the word 'ancestors' intending three persons ascending from the father, there are grounds for taking the word 'mother' in the large sense of mother, paternal grandmother, and paternal great-grandmother, namely, the coincidence of the text formerly cited ('The mother shares with her husband obsequies solemnly performed *by his son;* the paternal grandmother, with her husband; and the mother of the paternal grandfather, with her's') and of the following precept:

"At obsequies on the day following the eighth lunar day in certain months (अन्वष्टका), at those with a triple set of oblations (Vriddhi) at Gayá, and at the anniversary obsequies, the son should separately perform a S'raddha to his mother; in other cases he should perform obsequies to her with her lord.

"For it is there shown that in other instances the S'raddha should be performed to those women with their lords, for whom it is separately performed by the followers of the Yajurveda at the obsequies mentioned. But if this be taken as an indirect authority for considering the word 'mother' as bearing the secondary sense of maternal grandmother, then she is in truth benefited by her daughter's son." 2 Cole Dig., 609.

(*e*) "Among the followers of the Sáma-Veda," says Raghunandana, "*separate* S'raddhas in honor of women, even on festive (Vriddhi) occasions, are strictly prohibited. They are gratified by the oblations presented to their husbands, and do not require separate pindas." (*Raghunandana's S'raddha Tattwa-Abhyudayika S'raddha*, p. 142). See also Dayabhaga, XI, 6. 3.

offerings; and it is for this reason apparently that they are denied the heritable right, in the Dayabhaga, immediately after their husbands.

Competency of persons to offer oblations determined by fixed rules.

It is not every one who is entitled to present these offerings to the deceased. Even all his blood-relations do not promiscuously enjoy this privilege. There are certain rules, framed with great precision, which determine the order according to which persons are *entitled* to perform the Sraddha rites of their deceased kinsmen. The least deviation from the fixed order invalidates the ceremonies, and no spiritual benefit can be derived from them. It is of the utmost consequence, *therefore*, to frame laws which would regulate the order of succession of persons who would spiritually benefit the deceased by performing these ceremonies in their honor.

Inefficacy of offerings made by blood relations in contravention of the rules.

We will take our first extract on this point from the Vishnupurana:[1]

Rules taken from Vishnupurana.

"The persons who are competent to perform the obsequies of relations connected by the offering of the cake are the son, grandson, great grandson, the brother, the descendants of a brother, or the posterity of one allied by funeral offerings. In absence of all these, the ceremony may be instituted by those related by presentations of water only; or those connected by offerings of cakes or water to maternal ancestors. Should both families in the male line be extinct, the last obsequies may be performed by women, or by

[1] V. P., p. 318.

LECTURE III.

the associates of the deceased in religious or social institutions, or by any one who becomes possessed of the property of a deceased kinsman."

Again: "The first set of rites, being the most essential, are to be performed by the kindred of the father or mother, whether connected by the offering of the cake, or of water, by the associates of the deceased, or by the prince who inherits his property. The first and the last rites are both to be performed by sons and other relations, and by daughter's sons, *and their sons;* and so are the sacrifices on the day of the person's death. The last class or ancestral rites are to be performed annually with the same ceremonies as are enjoined for the monthly obsequies; and they may be also performed by females."

Dictum as to competency of daughter's grandson not followed.

The dictum of the *Vishnupurana* that the *grandsons of daughters* are competent to perform the Sraddha rites of their grandmother's father is not obeyed in our day. In no School of Hindu law is he recognised as an eligible person for the performance of the *párvana* rites, and we will not, therefore, take any more notice of him at present. It proves one thing, however, which deserves special remark. At the time of the *Vishnupurana*, the principle which determined the competency of kinsmen to present offerings to the deceased was not the same as that followed in all the Schools of the present day. We will touch upon this point again in a future Lecture.

The Mitakshara speaks in this matter with an authority which cannot be misunderstood. The Mitakshara is the standard textbook of the Benares School, but its paramount authority is acknowledged in all the Schools, even in matters relating to ceremonial rites.

Paramount authority of the Mitakshara.

If the Mitakshara had dwelt at large on this subject, much trouble would have been saved to the lawyers of the present generation, and their ingenuity would have been applied to some other branch of law. Our author, however, though his voice is clear, speaks with laconic brevity. Let us hear what he says:—

"It must not be thought even for a moment that, like libations of water, a *pinda* can be promiscuously offered by *all* the kinsmen of the deceased. The *son* alone is *entitled* to present it to his deceased father. On failure of sons, the nearest *Sapinda* has a right to give it. If there are no Sapindas *ex parte paterna*, the pinda can be offered by the Sapindas *ex parte materna*, &c. According to Gautama, 'On failure of sons, the Sapindas of the deceased, and then his mother's Sapindas, and then his disciple are competent to offer the pinda. On failure of all of them, the priest and the preceptor claim the right.' Where there are many sons, the eldest son has the right and preferential duty of presenting the pinda. We have the authority of Marichi on this point: 'Whatever is done by the eldest in this matter with the permis-

LECTURE III.

sion of all his brothers, and with the proceeds of the undivided (family) property, should be considered as done by all of them.' The law regulating the number of pindas is this: ten for a Brahman, and twelve only for a Kshatriya. Vishnu says:—The number of pindas is to be fixed according to the number of days a person is affected with impurity by the death of a kinsman. His words are: 'So long as impurity lasts, a libation of water and a pinda is to be offered to the deceased (every day).'"[1]

Dharma Sindhu Sara on the order of succession of blood-relations entitled to perform sraddha.

This is all that the Mitakshara says on this subject. The teachers who have followed in his footsteps, however, have given elaborate rules regarding this point. The *Dharma Sindhu Sara* of Kasinatha is a work of wide celebrity in the Benares School, and his authority in ceremonial matters is held in very high respect. In fact, wherever there is any difference of opinion on this subject between the teachers of different Schools, the authority of Dharma Sindhu is universally deferred to in all the districts included in the Benares School. We will, therefore, quote its authority in support of the following rules, which are taken from the chapter treating of persons competent to perform the Sraddha for the benefit of deceased kinsmen. The *Dharma Sindhu* says:[2]—

Son.

"The son of one's own body has the preferential

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[1] Mita., III, 16.

[2] Dharma Sindhu, Book III, Chap. II, p. 4.

duty and right to perform the annual and other Sraddhas, and the funeral ceremonies which take place immediately after death. If there are several such sons, the eldest has this duty and right; on failure of him, or if he is not present, or if his right has lapsed through having become an outcast, or similar disqualification, the eldest after him. The statement, however, made (elsewhere) that in the absence of the eldest, the youngest has always this right, and not the sons between them, is without authority. Hence, if sons live in a state of division, the eldest, after having received from the younger brothers the requisite funds, should perform all the funeral rites up to that called *Sapindana*. But the annual and other Sraddhas each of them must perform separately. If, however, sons live in a state of union, even the annual and other Sraddhas must be performed by one of them only. Still, since what is done by one member of an united family accrues to the benefit of the rest, all the sons should keep such rules, as the observance of chastity, the not-touching of another person's food, and similar ones. If sons do not live in the same place, whether they stay in different countries, or in different houses, each of them should perform the annual and other Sraddhas separately, even if they are members of an undivided family.[1]

Eldest to the exclusion of others.

Sons separately.

"In absence of the eldest, the younger brother next in order should perform the cremation and other

Younger son.

[1] Goldstücker's Lit. Rem., Vol. II, p. 195.

LECTURE III.

initiatory ceremonies during the first twelve months; but he should abstain from performing the *Sapindikarana.* He should wait for the eldest for full one year. If the eldest comes home in the course of the year, he should relieve the younger, and perform all the ceremonies himself. If the year is over, and the eldest brother is still absent, the younger brother must perform the *Sapindikarana*, or the first annual Sraddha. If the cremation, the monthly, the half-yearly, and other ceremonies have been performed by a person other than a son, all these rites, except cremation, must be performed over again by the son. The eldest must perform all of them over again, even if they have been already performed by a younger brother.

"Twelve classes of sons were recognised (by Hindu society) in former days. But in the present *(Kali)* age, they, with the exception of sons of the body, and adopted sons, do not receive social recognition. On failure of sons of the body, therefore, adopted sons are entitled to perform the Sraddha rites of their adoptive fathers. The adopted son is one who has been given, according to prescribed rules, to the adoptive father of the same class by the boy's natural father and mother, or by either of them. The husband has a right to give away the son, with the permission of his wife, in times of danger and distress. If the danger be very great, however, and the distress very severe, he may exercise his own right

Adopted son.

of giving away the son, even without the permission of the boy's mother. The mother can *never* give away her son without permission, previously obtained, of her husband.

Grandson and great grandson.

"On failure of an adopted son, the grandson and the great grandson claim the right. There are teachers, however, who lay down a different rule. According to them, the adopted son *follows*, and does not *precede*, the grandson and the great grandson in this matter.[1] When there is a son *not* invested with the sacred thread, and a grandson invested with it, the former is preferred to the latter, if he is more than one year old, and if he has gone through the ceremony of tonsure. If the son is more than three years old, he has the right of performing his father's Sraddha, even if he has *not* gone through the ceremony of tonsure. The *adopted* son is *then* alone entitled to the performance of the Sraddha rites, *when* he is invested with the sacred thread.

Widow (in case of deceased being a male).

Co-wife's son, and then husband (in case of deceased being a female).

"On failure of adopted sons, grandsons, and great grandsons, the widow claims the right of performing the Sraddha of her late husband,—and the husband of his deceased wife. The husband is not competent to perform the Sraddha rites of his wife in presence of a son of a rival-wife; or in other words, the son of a rival-wife is preferred to the husband. The wife is entitled to the performance of the

[1] Nirnaya Sindhu, 315.

LECTURE III.

Sraddha rites of her husband, even if her husband's brother, who lived joint in food, estate, and worship with her late husband, takes his property after his death. If the deceased lived separate from his brother, the widow alone is entitled to his property.

Daughter.

"On failure of the widow, the daughter is entitled to the performance of the Sraddha rites of her father, if the latter lived separate from his brother in food, estate, and worship. When there are both a married and an unmarried daughter, the former alone is entitled to perform the Sraddha rites, though the latter (only) takes the property. On failure of a daughter, the daughter's son takes the property and performs the Sraddha of his maternal grandfather. On failure of a daughter's son, the brother of the deceased claims this right. The nephew follows the brother.

Daughter's son.

"On failure of the widow, the brother of the deceased has this right, if the deceased lived joint in food, estate, and worship with him.

Uterine brother.

"Where there are brothers by the same mother, and brothers by different mothers, the former are preferred to the latter; and in this case the younger brother is preferred to the elder. On failure of the former, however, the latter has this right. Where there are more than one younger brother, the brother who is immediately younger than the deceased is preferred, and on failure of him, the brother next to him.

Similar rules apply to elder brothers, where there are more than one to claim the right. LECTURE III.

"On failure of brothers by the same mother, the step-brothers are entitled to this right. The rules of precedence among them are the same as those mentioned above. Half-brother.

"In the opinion of some teachers, the brother performs the funeral rites, in presence of the daughter and the son, even if the deceased lived separate from him, because, according to them, the daughter and her son being of a different *gotra* (bearing a different family name, and yielding allegiance to a different patriarch) are not entitled to perform the Sraddha of the deceased.

"On failure of the brother, the brother's son has this right; and where there are sons of uterine and step-brothers, their precedence is regulated by the rules laid down above—*i.e.*, the sons of the uterine brothers are preferred to those of step-brothers. Brother's son.

"On failure of the brother and the nephew, the father, the mother, the daughter-in-law, and the sister claim the right in succession. In case there are both uterine and step-sisters, the same rules apply to them as to uterine and step-brothers. Father, mother, daughter-in-law, sister.

"On failure of sisters, their sons are entitled to this right. The rules of precedence are the same as those mentioned above. Sister's son.

"On failure of a sister's son, the father's brother (or paternal uncle), the uncle's son, and the *other* Father's brother, his son, and other sapindas.

LECTURE III.

sapindas (according to their degrees of proximity to the deceased).

Samanodakas.

"On failure of the Sapindas, the *Samanodakas*, or those connected by libations of water, take their place."

Kinsmen of the same gotra.

On failure of these relatives, kinsmen of the same "*gotra*," or those sprung from the same common ancestor, bearing the same family title, and claiming allegiance to the same patriarch, are competent to celebrate the sraddha rites.

Maternal relatives.

After the paternal line is exhausted, the kinsmen through the mother make their appearance. They must be always postponed to kinsmen bearing the same family name, or *gotra*.

"On failure of *gotrajas*," the Dharma Sindhu continues, "Mother's father, mother's brother, his son, and the *other Sapindas ex parte materna* claim the right of performing the Sraddha of the deceased, in order.

Father's & mother's sister's son.

"On failure of them, the sons of the father's and mother's sisters.

Father's bandhus.

"On failure of them, the *bandhus* of the father, *viz.*, grandfather's and grandmother's sister's sons, and grandmother's brother's sons.

Mother's bandhus.

"In like manner, on failure of them, *the mother's bandhus*, *viz.*, the mother's father's sister's son, the mother's mother's sister's son, and mother's mother's brother's son.

Disciple.

"On failure of them, the disciple.

"On failure of him, the son-in-law is entitled to perform the Sraddha of his father-in-law, and the latter of the former.

LECTURE III.

Son-in-law

"On failure of him, a friend.

Friend.

"On failure of a friend, any one who takes the property of a Brahman may perform his Sraddha.

Any person taking the property (in case of the deceased being a Brahmin).

"In the case of one who is *not* a Brahman, the King takes the property of the deceased, and causes some worthy person to perform his funeral ceremonies; or a Brahman, when at the point of death, may adopt a son (*dharmaputra*) who may perform the ceremonies beneficial to the deceased.

King.

"On failure of a son and other issue of a natural father, the son of the latter (adopted by another person) may perform his Sraddha, and take his property. On the failure of issue of both natural and adoptive fathers, the adopted son may take the property of both, and perform their annual Sraddhas. On the day of the new moon, as well as in *pitripaksha*, or the dark fortnight especially dedicated to ancestors in the month of Aswina, the adopted son should also perform the Sraddhas of the ancestors of both his natural and adoptive fathers. The sons and grandsons of an adopted son are entitled in like manner to the performance of the Sraddha, and to the property of the adopted son's natural father and grandfather, in case the latter have no issue of their own."

Natural father of an adopted son entitled to pinda.

Here end the rules determining the order of succession of persons who are entitled to the perform-

Rules for Sraddha of a deceased female.

LECTURE III.

ance of the Sraddha rites of a male kinsman.

Let us now tabulate these results :—

BENARES SCHOOL.

Persons competent to celebrate Sraddha rites.

1. Son.
   - *a.* Eldest son.
   - *b.* Second son, &c.
   - *c.* Adopted son.
2. Grandson.
3. Great grandson.
4. *Widow.*
5. *Daughter.*
   - *a.* Married.
   - *b.* Unmarried.
6. Daughter's son.
7. Brother.
   - *a.* Whole brother.
     1. Younger.
     2. Elder.
   - *b.* Half-brother.
     1. Younger.
     2. Elder.
8. Brother's son.
9. Father.
10. *Mother.*
11. *Son's widow.*
12. *Sister.*
13. Sister's son.
14. Sapindas *ex parte paterna.*
    - *a.* Uncle.
    - *b.* Uncle's son, &c.

15. Samanodakas.
16. Sagotras, or kinsmen bearing the same family name.
17. Sapindas *ex parte materna.*
    - *a.* Maternal grandfather.
    - *b.* Maternal uncle.
    - *c.* His son, &c.
18. Bandhus.
    - *a.* Father's sister's son.
    - *b.* Mother's „ „
19. Father's Bandhus.
    - *a.* Father's father's sister's son.
    - *b.* „ mother's „ „
    - *c.* „ maternal uncle's son.
20. Mother's Bandhus.
    - *a.* Mother's father's sister's son.
    - *b.* „ mother's „ „
    - *c.* „ maternal uncle's son.
21. Strangers.
    - *a.* Pupil.
    - *b.* Son-in-law.
    - *c.* Father-in-law.
    - *d.* Friend.
    - *e.* KING, except of a Brahmana.

The rules in the case of female kinsmen are different. We quote again from Dharma Sindhu:

"The father of an unmarried daughter is entitled to perform her Sraddha. On failure of him, her brother, &c.

"In the case of a married woman who has no sons of her own, the son of a rival wife.

Lecture III.

"On failure of him, the grandson, great grandson, husband, daughter, daughter's son, husband's brother, husband's brother's son, daughter-in-law, father, and brother, in order.

"On failure of these, a brother's son and others mentioned above.

"It should be always remembered that the persons enumerated in the foregoing list, are entitled to perform the ceremonies of a deceased woman, only on the failure, or absence, of her own sons.

"In the absence of sons, *other* persons may perform her funeral and other incidental rites, but sons alone are entitled to her *sapindikarana*. On failure of the latter, the former may perform this rite also.

Initiatory funeral rites obligatory. Intermediate ones optional. Final ones compulsory on the inheritor of property.

"Here it is necessary to bear in mind that all persons from the Sapindas to the King *must* perform all the initiatory funeral rites. The intermediate set of rites ending with *sapindikarana* may or may not be performed by them. They need not perform the final set of ceremonies, also, if they do not inherit her property. But they are bound to perform these ceremonies, if they take her property.

"All the persons included in the list given above, from the sons to brother's sons, must perform all the ceremonies (initiatory, intermediate, and final) beneficial to her soul, whether they take her property or not. The daughter's son, and the latter's son also, should follow the same rule.

"The final funeral rites of a woman are to be performed on the anniversary of her death only, and *not* on the day of the new moon, &c. They share on these occasions the benefit accruing from these rites *with* their husbands, and these ceremonies, therefore, need not be separately repeated for them. But the initiatory and the middle set of ceremonies *must* be performed separately for the benefit of their souls."

Final rites for a woman performed only on the anniversary of her death.

The rules laid down by Rudradhara in his *Sraddha Viveka* are implicitly followed in the Mithila school. We will, therefore, follow his lead in treating of this School. The *Sraddha Viveka* mentions the following persons as competent to present funeral offerings to their deceased kindred :—

Rules for Mithila school.

"Among thirteen classes of sons, the son born of the body takes the first rank. The eldest is preferred to the younger sons.

2. Appointed daughter's son.

3. Then the other classes of sons in order,—the son of his wife begotten by another; the son of a young woman unmarried ; the son of a pregnant bride ; a son of concealed birth, whose real father cannot be known ; a son by a twice-married woman ; a son rejected by his natural parents ; a son adopted ; a son bought ; a son made ; a son self-given ; a son by a Sudra woman.

4. Grandson ; great grandson ; widow ; younger brother ; elder brother ; father ; brother's son, in order.

LECTURE III.

In default of a brother's son, the Sapinda relations are competent to perform the initiatory and the intermediate set of ceremonies.

5. Daughter; Sakulyas; Sapindas through mother; Sakulyas through mother; mothers.

6. Mistresses.

7. Any one who inherits the property of the deceased.

"The adopted grandson and the great grandson are competent to perform the Parvana Sraddha of their grandfather and great grandfather, even if the latter have sons of their own.

"If a boy dies before attaining the age of six years, only the initiatory ceremonies should be performed for him by his brother, father, &c., in order. If he dies before attaining the age of two years, these ceremonies should be omitted, and he should be buried and not burnt. The same remark applies to a girl who dies before completing the age of two years.

In case of females.

"With regard to a girl who dies after attaining the age of two years, but before marriage, only the initiatory ceremonies are to be performed for her by her father, brother, &c.

"In the case of married women, all the three classes of rites are to be performed for them by the following persons in order:

"Son; husband; son of rival wife; grandson; great grandson; *Sapindas; Sakulyas;* Sapindas of father."[1]

[1] Sraddha Viveka, Benares Ed., p. 21.

According to Sraddha Viveka, the Sapinda relationship extends to the seventh degree, including the survivor, in the ascending and descending male lines; and the Sakulya relationship to the tenth. So that seven generations of men, ascendants, descendants, and collaterals, are bound together by the tie of Sapinda relationship. The Sakulyas are three generations of persons beyond the Sapindas. LECTURE III.

Bengal school.

The rules determining the competency to perform the obsequial rites in the Bengal school, are not materially different from those obtaining in the Benares school. The following table compiled from Bhavadeva's Treatise[1] on Sraddha Rites, will give a clear idea about them :—

BENGAL SCHOOL.

SRADDHA.

a.—*Parvana, or ancestral.*

b.—*Ekoddishta, or individual.*

a.—PARVANA.

1. Son.
2. Grandson.
3. Great grandson.
4. Daughter's son.
5. Son's daughter's son.
6. Grandson's daughter's son.

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[1] Bhavadeva, Cal. Ed., 348.

LECTURE III.

b.—EKODDISHTA.

1. Son.
   - *a.* Eldest Son.
   - *b.* Youngest Son.
2. Grandson.
3. Great grandson.
4. *Widow.*
   - *a.* Having no son.
   - *b.* Mother of a disqualified son.
5. *Daughter.*
   - *a.* Maiden.
   - *b.* Betrothed.
   - *c.* Married.
6. Daughter's son.
7. Brother.
   - *a.* Youngest uterine brother.
   - *b.* Eldest ,, ,,
   - *c.* Youngest stepbrother.
   - *d.* Eldest ,, ,,
8. Brother's son.
   - *a.* Son of youngest uterine brother.
   - *b.* ,, ,, eldest ,, ,,
   - *c.* ,, ,, youngest stepbrother.
   - *d.* ,, ,, eldest ,, ,,
9. Father.
10. *Mother.*
11. *Son's widow.*
12. ,, *daughter.*
13. ,, ,, *married.*
14. *Grandson's widow.*
15. ,, *daughter.*

LECTURE III.

16. *Grandson's daughter married.*
17. Grandfather.
18. *Grandmother.*
19. Sapindas *ex parte paterna.*
Uncles and others.
20. Samanodakas *ex parte paterna.*
21. Sagotras (or kinsmen of the same family name).
22. Maternal grandfather.
23. *Maternal grandmother.*
24. Maternal uncle.
25. Sister's son.
26. Sapindas *ex parte materna.*
27. Samanodakas ,,
28. *Widow belonging to a different caste.*
29. *An unmarried woman living as wife.*
30. *Father-in-law.*
31. *Son-in-law.*
32. *Grandmother's brother.*
33. Strangers.
    a. Pupil.
    b. Priest.
    c. Spiritual preceptor.
    d. Friend.
    e. Father's friend.
    f. Servants of the same caste living in the same village.

The list given by Bhavadeva is essentially the same as that given by Rughunandana. The two authorities differ, however, with regard to the competency of the *maternal grandmother* and *great grand-*

LECTURE III. *son's widow* to perform these sacred rites. Raghunandana denies this privilege to the former and Bhavadeva to the latter.[1]

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[1] The following persons are competent, according to Raghunandana, to offer the exequial cake in the Bengal School:—

1. Eldest son.
Youngest son.
Grandson.
Great grandson.
Widow having no son.
Widow, mother of a disqualified son.
Maiden daughter.
Betrothed daughter.
Married daughter.
10. Daughter's son.
Youngest uterine brother.
Eldest uterine brother.
Youngest stepbrother.
Eldest stepbrother.
Son of youngest uterine brother.
Son of eldest uterine brother.
Son of youngest stepbrother.
Son of eldest stepbrother.
Father.
20. Mother.
Daughter-in-law.
Son's unmarried daughter.
Son's daughter, married.
Grandson's widow.
Grandson's daughter.
Grandson's son's widow (?)
Grandfather.
Grandmother.
30. { Paternal uncle, and other Sapindas, *ex parte paterna*.
Samanodakas, *ex parte paterna*.
Sagotras (kinsmen bearing the same family name).
Maternal grandfather.
Maternal uncle.
Sister's son.
Sapindas, *ex parte materna*.
Samanodakas, *ex parte materna*.
Widow belonging to a different caste.
An unmarried woman living as wife.

Nirnaya Sindhu, the great Marhatta authority, whose opinion is highly respected also in the other

LECTURE III.

Rules for Bombay school

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40. Father-in-law.
Son-in-law.
Brother of grandmother.
Pupil.
Priest.
Spiritual preceptor.
Friend.
Father's friend.
48. Servants of the same caste living in the same village.

These forty-eight persons are entitled to perform the exequial ceremonies of a deceased kinsman.

The following persons are competent, in the Bengal School, to perform the funeral ceremonies in honor of a deceased kinswoman :—

1. Eldest son.
Youngest son.
Grandson.
Great grandson.
Maiden daughter.
Betrothed daughter.
Married daughter.
Daughter's son.
Son of a rival wife.
10. Husband.
Daughter-in-law.
Husband's sapindas, *ex parte paterna.*
Samanodakas of the husband, *ex parte paterna.*
Sagotras, kinsmen bearing the family name of the husband.
Father.
Brother.
Sister's son.
Husband's sister's son.
Brother's son.
20. Son-in-law.
Husband's maternal uncle.
Husband's pupil.
Father's samanodakas, kinsmen of the father's family; mother's samanodakas, kinsmen of the mother's family.
24. Learned Brahmins.

Twenty-four only.*

* Raghunandana, Suddhi Tatwa, 494.

LECTURE III.

taken from Nirnaya Sindhu.

schools, thus enumerates the persons competent to perform the Sraddha of a deceased kinsman :

" Son begotten by the man himself, and born in lawful wedlock; grandson ; great grandson; adopted son ; then the other eleven classes of sons in order ; widow.

Persons entitled to pindas according to Nirnaya Sindhu.

" (Husband, if not excluded by the son of a rival wife.)

" On failure of the widow, the *brother* is competent to perform the ceremonies, if the deceased lived joint with him.

" If he was separate, the *daughter* must perform them, for she takes the heritage. Among married and unmarried daughters, the former exclude the latter. On failure of the daughter, the daughter's son comes next, as he inherits the property of the deceased.

" On failure of the brother, the brother's son ; father ; mother ; daughter-in-law ; sister ; sister's son, &c., for they receive the inheritance.

" On failure of all these, *Sapindas*, and then *Samanodakas*, *ex parte paterna*.

" On failure of kinsmen *ex parte paterna*, Sapindas and Samanodakas *ex parte materna* claim the right.

" On failure of all these, the disciple, the priest, the spiritual preceptor, the son-in-law, nay even a *friend*, are competent to offer the exequial *pindas*.

" If the deceased has neither a relative nor a friend to honor his memory by performing the obsequial rites, the KING, as the father of all his subjects, may

cause the final ceremonies to be celebrated by competent persons."[1] Lecture III.

We have been hitherto concerned with persons who are competent to perform the obsequial rites. We have said nothing about the persons *to whom* pindas and libations of water are due from their kindred.

The Nirnaya Sindhu, quoting from Smriti Sangraha, enumerates the following persons who are honored in the *pitripaksha*, in holy places, and on all occasions when libations of water are given to ancestors. The Nirnaya Sindhu, as I said before, is highly esteemed in all the schools, and its dictum, therefore, on this point is authoritative.

"The three immediate paternal ancestors with their wives; stepmother; the three immediate maternal ancestors with their wives; deceased wife; son and others (grandson and great grandson); paternal and maternal uncles, and brothers—all with their wives; father's and mother's sisters with their children and husbands; sisters with their children and husbands; father-in-law (and mother-in-law); preceptor; disciple; and friends."[2]

Pindas offerable by females

In like manner *pindas* are due from females to

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[1] Nirnaya Sindhu, Lucknow Ed., 317.

[2] तातांम्बात्रितयं सपत्नजननी मातामहादित्रयं
सस्त्रि स्त्रीतनयादि तातजननी स्वभ्रातरः सस्त्रियः ।
ताताम्बात्मभगिन्यपत्यधवयुक् जायापिता सद्गुरुः
शिष्याप्ताः पितरो महालयविधौ तीर्थे तथा तर्पणे ॥
Nirnaya Sindhu, p. 124.

to certain specified persons only.

certain persons. So long as their husbands are alive, they are not competent to perform any religious ceremony whatever. "No sacrifice," says Manu, "is allowed to women apart from their husbands, no religious rite, no fasting; as far only as a wife honors her lord, so far she is exalted in heaven."[1] But after the death of their husbands they claim the right to present obsequial offerings to the following persons:

We quote again from Nirnaya Sindhu, which is supported by Smriti Sangraha:

"Deceased husband; father-in-law and mother-in-law; grandfather and grandmother of husband; her three immediate paternal ancestors with their wives; and the three immediate maternal ancestors with their wives."

Libations of water offerable promiscuously by kinsmen.

Like balls of funeral cake, libations of water are also due to deceased kinsmen. The rules with regard to these libations are not so strict as in the case of *pindas*. Water may be presented *promiscuously* by the kinsmen of the deceased. Degrees of proximity need not be calculated in this case with exact precision. It is enough to say that water may be presented with or without pindas by the kinsmen of the deceased. Gautama says:[2]

"The Sapindas shall offer libations of water for a deceased relative whose tonsure has been performed; as well for the wives and daughters of such a person.

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[1] Manu, V., 155.

[2] Gautama, Ch. XIV.

Some declare that it must be done in the case of married female relatives also."

LECTURE III.

All the persons who are entitled to pindas, have also a right to libations of water. Besides these, there is another class of persons who are entitled only to libations of water, and nothing more. These are remote ancestors, who cannot claim *pindas*. These are seven generations of ancestors, according to the Mitakshara, beyond the first seven. Manu says, however, that the Samanodaka relationship ends only when the names and births of the remote ancestors can no longer be distinguished.[1] Thus we find that

Persons entitled to pindas have a right to libations. Remote ancestors entitled to libations only.

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[1] Manu, V, 60.

In connection with this subject, the following extract from Steele's valuable work on the Law and Customs of Hindu Castes in Bombay may be read with great interest. The author is describing the existing customs with regard to funeral rites and annual oblations to deceased kinsmen :

"On the death of a man, whether separate or in community, the duty of performing his funeral, and subsequently the monthly and annual ceremonies of purification for the dead, devolves on his heir. In default of his eldest son, the youngest son should perform the funeral ; 3, brother ; 4, brother's son ; 5 any heir, as the sister's son, or a *sagotra*. Should the son not be on the spot, the nearest relation present may perform *kriya*, or funeral rites. The *Sapindikarana* should be performed within the year, if possible, and on the spot where the father died, and only by the son, or the relation who performed the *kriya*. Should the party be disabled by sickness, he may appoint a sister's or daughter's son of the deceased to perform the ceremonies in his stead. The eldest son defrays the expenses of the *kriya* out of the common property, or if, after partition, he performs the ceremonies at his own charges, the others contribute to the expense at his requisition. All might perform the monthly and annual ceremonies at their separate charges, if after partition, as other religious ceremonies.

"An heiress is subject to the same rules, but she appoints a relative as *dharmaputra* to be the actual performer of the ceremonies.

"After paying the deceased's debts, and providing for an entertainment to the caste, the remainder is given away in charity in the event of a man dying with distant relations only. In this case, or on refusal

LECTURE III.

all our blood-relations, whatever degree of relationship they may bear to us, nay even those with whom we are connected by marriage, or by a tie of friendship, claim a handful of water from us for the benefit of their souls in the other world. They claim a tear of remembrance from us, a memento of our gratitude and affection, and it is freely given to them by all true followers of the *Sanatana* (eternal) faith.

Rules regarding impurity determine proximity of kinship.

In calculating the degrees of proximity of a kinsman to the deceased, the rules concerning *impurity* are of great assistance. On the death of a blood-relation all his kindred are affected with impurity, but in different degrees of intensity. Their bodies become impure, and they are not allowed to perform religious ceremonies during the period of impurity. They must allow their hair and nails to grow, and abstain from animal food. Their food cannot, during this time, be partaken of by others, and they cannot partake of the food of others. They must remain isolated, as it were, from society, during this period

Effects of impurity.

of the next heir to perform a man's *kriya*, he may give his property to another, on condition of his performing the ceremonies, and the survivor cannot dispossess such a conditional heir. A *wattan* service is often given to a stranger, if there are no near heirs. The distant relations then perform the rites for their own purification, and to insure the supposed happiness of the deceased in another state of existence. Hence, if the individual whose duty it is to perform the rites refuse, he is subjected to fine before readmittance to caste privileges without being precluded from receiving the property. The *kriya* is, however, performed at his charges. His share may be given to his son. The *Sirkar* (Government) may have the *kriya* performed out of the attached proceeds of the deceased's estate." Pp. 225-227.

of mourning. The rules of impurity are rigidly enforced in Hindu society, and no one is allowed to deviate from them, unless there are very exceptionable circumstances which justify such violation.

Importance of the rules.

These rules of impurity are important, inasmuch as they enable us to find out in many cases the exact position of a person in the scale of kinsmen having *heritable* blood in his veins. In the language of an eminent scholar, the nearer a person is related to the deceased, the greater is the direct or indirect benefit he is able to confer on the latter's soul, the nearer too are his claims to inheritance. According to the degree a person owes the Sraddha to a relative, in that proportion the purity of his body is also affected by the death of that relative; and the time within which the impurity he suffers in consequence can be removed by certain religious acts, depends, therefore, on the degree of relationship in which he stood to the deceased. This degree of relationship in its turn can be determined if we know the term of impurity which a person has to pass through on the death of his kinsmen; for the term is longer or shorter, according as the degree of relationship is nearer or more distant.

Gautama.

We will first of all quote from Gautama, the oldest lawgiver among the Hindus :[1]

" The Sapindas become impure by the death of a relative during ten days and nights.

[1] Gautama, XIV, Ch.

LECTURE III.

"The impurity for a *Kshatriya* lasts for eleven days and nights; or, according to some, for half a month.

"That of a Sudra for a whole month.

"And if he hears of the death of a Sapinda after the lapse of ten days and nights, the impurity lasts for one night, together with the preceding and following days.

"This is also the case when a relative, who is *not* a Sapinda, a relative by marriage, or a fellow-student, has died."

Suddhi Tatwa (Mithila school).

We now come to *Suddhi Tatwa* of Rudradhara of the Mithila school, whose authority on this point is universally respected. These rules are in force at the present day:

"Impurity lasts for ten days on the death of a Sapinda; and three days only on the death of a Sakulya.

"If the name, birth, and lineage of a deceased person could be traced step by step to a common ancestor beyond the Sakulya degree, or beyond ten generations, impurity would last on his death for a day and two nights. But if these could not be traced, but it was generally known that the deceased belonged to the same stock, ablution alone would free a kinsman from impurity.

"On the death of his maternal grandfather, the daughter's son is affected with impurity for *three* days; but on the death of his maternal grandmother, only a day and two nights.

LECTURE III.

"Impurity lasts for a day and two nights on the death of a maternal uncle; mother's sister's son; father's sister's son; maternal uncle's son; daughter's son; and a sister's son.

"It also lasts for the same time on the death of mother's stepsister (?); maternal uncle's wife; and father's sister.

"It lasts only for one night on the death of mother's stepbrother; mother's father's sister's son; mother's maternal uncle's son; father-in-law; mother-in-law; and brother-in-law."

Sraddha ceremonies serve as a key to the Hindu Law of Inheritance.

The importance of the Sraddha ceremonies from a legal point of view cannot be overrated. The competence of a person to offer these oblations forms the test of his title to the inheritance. It is a well-known saying, that "he alone is entitled to the property of the deceased who is competent to present exequial offerings to him." The principle that the right of inheritance, according to Hindu law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor, has been laid down by the highest judicial authority.[1] It has been often remarked by the Judicial Committee of the Privy Council, that "there is, in the Hindu law, so close a connection between their religion and their succession to property, that the preferable right to perform the Sraddha is commonly viewed as governing

Spiritual benefit the criterion of the right of inheritance.

[1] B. L. R.: Amrita Kumari, II, F.B., 28; Gurugovinda Mandal, V, F.B., 15; Govinda Prasad, XV, 35, &c., &c.

LECTURE III.

also the preferable right to succession to property."[1] In the language of an eminent scholar, "a kind of spiritual bargain is at the root of the Hindu law of inheritance. For the direct or indirect benefit of his future life, a person requires after his death certain religious ceremonies—the Sraddha—to be performed for him; and since these ceremonies entail expense, his property is supposed to be the equivalent for such expense."[2] "Two motives," says the *Dayabhaga*,[3] "are indeed declared for the acquisition of wealth;—one, temporal enjoyment; the other, the spiritual benefit of alms, and so forth. Now, since the acquirer is dead, and cannot have temporal enjoyment, it is right that the wealth should be applied for his spiritual benefit;" and this spiritual benefit can be conferred only by the performance of the Sraddha ceremonies in honor of the deceased. "Inheritance, accordingly," he goes on to say, "is in right of benefits conferred, and the order of succession is regulated by the degree of benefit."[4]

"With the notion of responsibility," says Sir Henry Maine,[5] "after death, the notion of expiation was always associated. Building upon this last notion (and forgetting, apparently, the original motive of the Sraddha ceremonies), the Brahmanical commentators

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[1] 12 M. I. A., 96; 9 M. I. A., 610; 12 M. I. A., 541; 9 B. L. R., 394.
[2] Goldstücker, Vol. II, p. 169.
[3] XI, 6, 13.
[4] Dayabhaga, XI, 6, 29.
[5] Maine's E. I., 331.

gradually transformed the whole law, until it became an exemplification of what Indian lawyers call the doctrine of spiritual benefit. Inasmuch as the condition of the dead could be ameliorated by proper expiatory rites, the property descending or devolving on a man came to be regarded by these writers partly as a fund for paying the expenses of the ceremonial by which the soul of the person from whom the inheritance came could be redeemed from suffering or degradation, and partly as a reward for the proper performance of the sacrifice.

"There ought to be nothing to surprise us," he continues, "in the growth of such a doctrine, since it is only distinguished by its logical completeness from one which had influence on Western jurisprudence. The interest which, from very early times, the Church claimed in the moveable or personal property of deceased persons, is best explained by its teaching, that the first and best destination of a dead man's goods was to purchase masses for his soul, and out of this view of the proper objects of wealth the whole testamentary and intestate jurisdiction of Ecclesiastical Courts appears to have grown."

The principle strictly true in the case of the Bengal school.

It has been doubted, however, whether this principle is universally true in *all* the schools of Hindu law.[1] "It is strictly and absolutely true in Bengal," but it has been asserted that it is not so elsewhere. The question whether the doctrine of spiritual

[1] Mayne's Hindu Law, 9, 423.

LECTURE III.

benefit is applicable to all the schools of Hindu law is extremely important, for if it can be proved that the principle is *universally* true, the logical consequences of the doctrine would easily determine the order of succession, wherever there are disputed points to be settled by British Courts of Justice. We shall examine the question at length in a future Lecture, and show the connection which exists between the competence to present ancestral offerings and the title to inherit the property of the deceased proprietor.

LECTURE IV.

SOURCES OF HINDU LAW.



Ascendency of Law—Sources of law according to Manu: 1. Revelation, 2. Institutes of sages, 3. Usages — According to Yajnavalkya—Intention, test of legality—Divine will, the origin of law—Custom: its validity—Revealed Law contained in the Vedas—Human Law in the Codes of sages—Superiority of the former—The Vedas three in number, A fourth subsequently added—*Sanhita* and *Brahmana*—Mantras—Found in the Sanhitas of the Vedas, Rig-Veda — Yajurveda—Brahmanas—Origin in Divine Will—Sanhita and Brahmanas of the Rik-Veda, Sama-Veda, Yajurveda, Black and White Yajus, Atharva Veda, full of materials of historical interest—Descriptive of society in the remote past—Rules of conduct sanctioned by revelation—Rig Veda songs—Indicate advanced stage of civilization — Caste system unknown in Vedic age—Ramifications of the Vedas—Sutras—Sruti—Smritis—Served as *memoria technica*—Aphoristic school — Cultivation of memory—Sutras classified — Dharma Sutras, or Maxims of Law—Fountain source of the ancient Codes—History of Hindu jurisprudence—Necessity for law not felt in the patriarchal age—Felt with the extension of social relations—Civil Law not continuously treated of in the Mantras and Brahmanas—Sutra schools — *Charanas* — Spiritual fraternities — Their number same as that of the Vedas—Decline of the influence of the fraternities—The ceremonial branch of the aphorisms cultivated to the neglect of the study of legal maxims — Establishment of Civil Government — Social progress destructive of priestly ascendency—Buddha—His teachings—Equality—*Summun bonum* of life—Effects of his teachings—Rules of Inheritance the same with the Hindus and Buddhists—Neglect of the study of ancient dharma sutras—Administration of Law in different periods—Gautama—Law—Judiciary—Constitution of judicial assembly—Decision of a single man learned in the Vedas—Privileges of spiritual fraternities discontinued—Brahminic influence in the legislative and judicial assemblies—Apastamba—On the origin of Law — Law created by social wants — Vasistha — Decisions of eminent lawyers—Manu—Yajnavalkya and Parasara—Vrihaspati—Law laid down by Jurists—Chronological uncertainty of ancient Sanskrit works—History of ancient civilization in India divisible into epochs—Possibility of determining the relative ages of ancient lawgivers—Mantras older than

LECTURE IV.

Brahmanas, which again are anterior to Sutras—Mantra period—Sources of Hindu law: 1. Veda; 2. Smritis—Old law-givers—Yajnavalkya's list—Padma Purana's addition — Four principal authorities — Text-books compiled from oral instruction—Institutes of law classified—Relative ages of four principal lawgivers—Gautama first in order—Baudhayana on Penance and Expiation—Comparison with Gautama—Vasishtha—His second-hand reproduction of Baudhayana's aphorisms—Both Baudhayana and Vasishtha posterior in date to Gautama—Similarity of Apastamba's and Baudhayana's doctrine—Occasional conflict of their opinions—Apastamba's attempt at overthrow of Baudhayana's conservatism—Dr. Bühler on the chronological precedence of the two sages—Apastamba's priority to Vasishtha—Established by arguments — Their views as to different kinds of sons—Views of other legislators—Vehemence of Apastamba's language—Vasishtha's advocacy of ancient institutions—Baudhayana on illegitimate sons—Confuted by Apastamba—Conclusion—But supported by Vasishtha—Apastamba's native place — Sutra works — Sages of the aphoristic period—Internal evidence as to their priority to Manu — Harita — *Yama* — *Sankha*—Current edition of his work written in prose not referable to Sutra period—Probability of the name of its author being fictitious—Parasara—Books on ritual and expiation bearing his name, are the metrical editions of the original—The period in which he lived—Third class of legal treatises — Manu — Calculation of the period in which he lived — Results of computation made by scholars—Their mode of calculation not satisfactory—A Similar attempt at fixing the date of Narada—Manu older than Yajnavalkya, and Narada younger than the latter—Metrical composition characteristic of this period—Manu of the ancient legislators not to be identified with the author of the Institutes — Tradition as to three redactions of Manu examined—Antiquity of Manu's Code—Narada's work a systematic treatise on law—Weber on the posteriority of Yajnavalkya's Code to Manu's—Chronological sequence of Manu, Yajnavalkya, and Narada — Vishnu — Nature of aphorisms—Vishnu-Smriti is not the metrical version of what are called the Vishnu-Sutras: fallacy of the contrary proposition—Vishnu's age subsequent to that of Manu and Yajnavalkya—His description of social condition—"*Jangala*"—Vishnu's laws point to an advanced state of society—Four later lawgivers—Devala first in the order of succession—Brihaspati second — Katyayana — Vyasa — Not identical with the famous author of the Mahabharata—He delivered his laws at Benares—Summary.

Ascendency of law.

"Law," we read in the Veda,[1] "is the king of kings, far more powerful and rigid than they: nothing can be mightier than law, by whose aid, as by that

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[1] Sá. Br., 14. 4, 2, 23; Bri. Ar. Up., I, 4, 14.

of the highest monarch, even the weak may prevail over the strong."

LECTURE IV.

Sources of law according to Manu.

1. Revelation.

2. Institutes of sages.

3. Usages.

The "roots," or sources of law, according to Manu, are four in number: Revelation, or the uttered thoughts of inspired seers; the Institutes of revered sages, handed down by word of mouth from generation to generation; the approved and immemorial "usages" of the people; and that which satisfies our sense of equity, and is acceptable to reason.[1]

According to Yajnavalkya.

Yajnavalkya improves upon the text of his predecessor, and adds that "an act proceeding from good intention" should also be declared as a "source" of law.

Intention, test of legality.

Intention, according to modern Jurists, is the test of the legality or illegality of an action. Our motives declare whether our acts should be considered as offences punishable by law, or whether they are such that the law can take no cognizance of them even if the results are injurious to others.

Divine will, the origin of law.

If we now translate the words of Manu and Yajnavalkya into the language of the present day, they would mean that law is two-fold,—Divine and Human. Law has its origin in divine will, and is interpreted by eminent sages of antiquity, whose writings are entitled to the highest esteem.

Custom: its validity.

Custom, in course of time, superseded, in many instances, in obedience to the law of progress, the written Institutes of the ancient sages, engraved though they had been on the tablets of memory. But custom to have

[1] Manu, II, 6.

Lecture IV.

the force of law must be viewed by the light of reason, and the sense of equity must guide our judgments. The motive of an action is the test of its legality, and all acts proceeding from bad motives, and which are productive of harm or mischief to others, must be condemned and punished as prejudicial to the interests of society. "Equity and good conscience," to use the common legal phraseology, must prevail over all human sources of law. "A decision must not be made," says Vrihaspati, "by having recourse to the letter of written Codes, since, if no decision were made according to the reason of the law, there might be a failure of justice."

Revealed Law contained in the Vedas.

Human Law in the Codes of sages.

Superiority of the former.

The Revealed Law of the Hindus is contained in the Vedas; and the Human Law, in the Codes of Manu, Yajnavalkya, Parasara, and other sages. These Codes, or Institutes, are founded, it is believed, on Revelation, and derive their authority from Divine Law. If, therefore, it be ever found that the Revealed Law is at variance with the rules laid down in human "Institutes," the latter should be set aside at once, and the law of divine origin must assert its supremacy.[1]

The Vedas three in number. A fourth subsequently added.

The Vedas were originally three in number: Rik, Yaju, and Sama. At a more recent period, a fourth Veda—Atharva—was added to them; but it never obtained that sanctity which was allowed to the

[1] श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।
तत्र श्रौतं प्रमाणन्तु तयोर्द्वैधे स्मृतिर्वरा ॥

other Vedas. It should never be forgotten, however, that all the four Vedas are considered to be of divinely inspired origin. LECTURE IV.

Each of these four Vedas consists of two distinct parts—a *Sanhitá* or collection of Mantras and a portion called Bráhmana. *Sanhita and Brahmana.*

The word *mantra* is derived from the root *man*, to think; so that the word literally means "thoughts." These were the inspired "thoughts" (of primeval saints) *centered* upon that divine light which illumines the darkest recesses of the human mind. They were either invocations or prayers, hymns in praise of the great Being who showered His choicest blessings upon his chosen people, the *Aryas* of this land of milk and honey. A *mantra*, says a German *savant*, "is either a prayer, or else a thanksgiving, or adoration addressed to a deity; it declares the purpose of a pious act, or lauds or invokes the object; it asks a question, or returns an answer; either directs, enquires, or deliberates; blesses or imprecates, exults or laments, counts or narrates;" asks for food, or longs to pay homage to the Great Benefactor of the Universe. None but a believer can enter into the true spirit of these hymns. Millions of men depend upon them for salvation, and repeat them every day with the firm belief that they will obtain divine mercy through them. These *mantras* are the repositories of all the sacred knowledge of the Hindus, and are guarded as the most precious treasures which man Mantras.

LECTURE IV.

can possess. The solemn secrets they contain are known only to the initiated few, who with their dying breath entrust them to their children, and thus hand them down from generation to generation.

Found in the Sanhitas of the Vedas.

These *mantras* are to be found in the Sanhitas of the Vedas. The Rig-Veda is rich in these sacred

Rig-Veda.

songs, and the *Sama* and the *Yaju* have freely borrowed them from the oldest Veda. The Rik is the parent tree, and the other two are only its offshoots. The Sama and Yaju have been very properly called the *attendants* of the Rik. There are believers, however, who, forgetting the substance of true religion in the forms it prescribes, have greater veneration for Yaju than for the other Vedas.

Yajur-Veda.

"The Yajur-Veda," says Sayana in his introduction to the Taittiriya Sanhita, "is like a wall, and the two other Vedas are like fresco paintings on it." The Brahmans of India, though they hold all the Vedas in the highest veneration, and believe them to be of divine origin, owe allegiance, however, only to *one* of them, to the exclusion of the other three. There are some who claim the privilege of studying *two* Vedas, some *three*, and others *four*. But, as a general rule, they pay their homage only to one, and guide their conduct by the laws laid down in that particular Veda.

Brahmanas

The *Brahmanas* are theological expositions of the *mantras*. They are ritualistic treatises, which enjoin sacrifices and explain their meaning. They are the

productions of a theological age, and are saturated with theological metaphysics. "They give injunctions as to the performance of sacrificial acts, explain their origin, and the occasions on which the mantras are to be used, by adding sometimes illustrations and reasons, and sometimes also mystical and philosophical speculations." They contain citations of hymns in fragments, and show that the *Sanhitas* of the Vedas were widely studied and minutely remembered. They must, therefore, be later in point of time than the mantras. With respect to their age, Dr. Weber says: "They all date from the period of the transition from Vedic civilization and culture to the Brahmanic mode of thought and social order. They originated in the opinions of individual sages, and were imparted by oral tradition, and preserved, as well as supplemented, in their families, and also by their disciples. The more numerous these separate traditions became, the more urgent became the necessity for bringing them into harmony with each other. To this end, as time went on, compilations, comprising a variety of these materials, and in which the different opinions on each subject were uniformly traced to their original representatives, were made in different districts, by individuals peculiarly qualified for the task."[1]

The canons of the Brahmanas inspire the same sacred awe as the mantras. Both have the same source, according to Hindu belief, and are equally

[1] Weber's History of Sanscrit Literature.

LECTURE IV.

Origin in Divine Will.

the objects of veneration. Both have proceeded from Divine Will, and both are, therefore, the revealed Scriptures of the Hindus.

The Divine Law of the Hindus, therefore, is to be sought for and found in the *mantras* and Brahmanas.

Sanhita and Brahmanas

The Sanhita of each Veda has a set of Brahmanas attached to it.

of the Rik-Veda,

The Rik has *Aitareya*, *Kaushitaki* or *Sankhayana* Brahmanas attached to it.

Sama-Veda,

There are eight Brahmanas relating to the Sama-Veda. The *Samavidhana* and the Tandya Maha-brahmana may be mentioned as representatives of this class.

Yajur-Veda.

The Yajur-Veda is divided into two schools, and the text-books of these schools are respectively called Black and White Yaju. There was a dissension between the teachers of Yajur-Veda, and the sage Yajnavalkya led the dissenting party. The text-

Black and White Yajus,

book of his school is called the White Yaju. The Black Yaju is known as *Taittiriya* Sanhita, and the White Yaju is called the *Vajasaneya* Sanhita.

The Taittiriya *Brahmana* is attached to the former, and Satapatha Brahmana to the latter.

Atharva-Veda.

Gopatha Brahmana relates to the Atharva-Veda.

Full of materials of historical interest.

I shall have to make frequent references to these Vedic works in the course of our lectures, and I deem it proper, therefore, to mention the names of these treatises in this place. These are valuable records of Vedic antiquity, and the materials of historical

research are to be found *only* in these works, replete as they are with Brahmanic wisdom. LECTURE IV.

Descriptive of society in the remote past.

The state of society they depict is well worthy of notice. Hindu Law has its origin in Vedic manners and customs, and its spirit is derived from the social organization of the Vedic age. It is a trite saying, that Law is not the creature of a day, but it *grows* from the customs of successive ages.

Rules of conduct sanctioned by revelation.

The Hindus universally and sincerely believe that all their ancient usages and established rules of conduct have the sanction of an actual revelation from heaven; and the modern jurists are of opinion that, in order to trace the development of the legal institutions of a country, we ought to go to the fountain-head, and there observe the germ of their growth.

Rig-Veda songs.

The songs of the Rig-Veda give us an insight into the social order of the Vedic age:

Indicate advanced stage of civilization.

"The social condition of the Hindus," says an eminent scholar, "as reflected by the hymns of this Veda, is not that of a pastoral or nomadic people, but, on the contrary, betrays an advanced stage of civilization. Frequent allusion is made in them to towns and cities, to mighty kings, and their prodigious wealth. Besides agriculture, they mention various useful arts which were practised by the people, as the art of weaving, of melting precious metals, of fabricating cars, golden and iron mail, and golden ornaments. The employment of the needle, and the use of musical instruments, were known to them. They

LECTURE IV.

also prove that the Hindus of that period were not only familiar with the ocean, but sometimes must have engaged in naval expeditions. They had some knowledge of medicine, and must have made some advance in astronomical computation, as mention is made of the adoption of an intercalary month, for the purpose of adjusting the solar and lunar years.

"Nor were they unacquainted with the vices of civilization, for we read in these hymns, of common women, of secret births, of gamblers and thieves.

"There is also a curious hymn, from which it would appear that even the complicated law of inheritance, which is one of the peculiarities of the existing Hindu Law, was to some extent already in use at one of the periods of the Rig-Veda hymns.

Caste system unknown in Vedic age.

"The institution of caste, however, seems at that time (the Sanhita period) to have been unknown, for there is no evidence to prove that the names which at a later period were current for the distinction of caste, were employed in the same sense by the poets of these hymns."[1]

Ramifications of the Vedas.

It is beyond our province to describe the different *branches* of the Vedas. Suffice it to say, however, that each of the Vedas "branched off into various *Sákhas*, or, as we might say, into various editions, which, though in the main concurring in their contents, nevertheless contained verbal differences enough to account for the divisions of their respective schools."

[1] Goldstücker's Literary Remains, Vol. I, p. 271.

We shall have occasion to speak of the Vedic Schools of Law, when we come to treat of the next division of Vedic Literature.

LECTURE IV.

Sruti.

The *mantras* and the *Brahmanas* are collectively known as *Sruti*, or revelation. With the ritualistic canons of the Brahmanas ended the Vedic Literature properly so called. These liturgic treatises had grown unwieldy; the mass of theological matter collected in the Brahmanas had become so large, the sacrificial details, enjoined and illustrated, had become so various and perplexing, that an imperative necessity was felt for arranging and systematising the vast collection of materials of the *Brahmanas.* Concise collective summaries of this great mass became absolutely necessary, as it was impossible to follow *the thread* of the diffuse discussion of sacrificial details and metaphysical mysticism. "The utmost brevity was requisite in condensing this great mass, in order to avoid overburdening the memory; and this brevity ultimately led to a remarkably compressed and enigmatical style—known as *Sutra* or thread—which was more and more cultivated as the Literature of the Sutras became more independent, and in proportion as the resulting advantages became apparent." Various ingenious conjectures have been given as to the origin of the word *Sutra,* a thread, a string, a clue. We believe that the aphoristic rules were called by this name, inasmuch as it was by means of these *Sutras* that the bewildering maze of Vedic rituals could

Sutra.

LECTURE IV.

be *threaded*, and because they afforded *a clue* to the intricate labyrinth of the theological discussions of the *Brahmanas*. The elaborate details were so diffuse, that they became unmanageable, and could not be grasped by the mind, unless the arguments advanced were consecutively *strung* together and shown as in a mirror. These *Sutras* might be called Vedic Encyclopedias. They were a collection of the principal facts, principles, and discoveries in all branches of the Vedic Literature, digested under proper titles and arranged under proper heads. Extreme brevity was the great object of the aphoristic style of composition, and it became a common saying that "an author rejoiceth in the economising of half a vowel as much as in the birth of a son."

Smritis.

The aphoristic rules were called *Smritis*, or remembrance, as distinguished from *Sruti*, or audition.

The name of *Smritis* was appropriately given to them. They were the Vedic *formulæ*, which could be easily remembered: "The dark, unfathomed caves of the Vedic ocean contained innumerable gems of purest ray serene," but few could dive deep, and bring them to the light of the sun. When, however, they were brought to the surface and arranged and classified under proper heads, their nature could be minutely examined, and the mind could, at one glance, grasp and remember their names. These aphorisms were intended as memorial sentences,

Served as

which were communicated to the pupils, which the latter learnt by heart and *remembered*, and which were supplemented by the oral explanations of the teachers.

LECTURE IV.

memoria technica.

The founders of the aphoristic schools were considered *human* authors, though entitled to the highest veneration. Their works in time partly superseded the study of the Vedas, and all the religious ceremonies were performed by the aid of these concise aphorisms. In progress of time the Vedic language had become unintelligible; but the aphorisms written in comparatively modern style could be easily understood and easily retained. A true believer, however, though he is allowed all external aids in interpreting and mastering the Vedic ritual, is enjoined to learn the Vedas by heart; and there are thousands of Brahmans to this day who can repeat from memory the *branch* of the Veda to which he belongs, the *Brahmanas* attached to it, and the *Sutras* relating to them. It is not uncommon to meet with men who can repeat from memory every word of the Sakala branch of the Rig Veda, the whole of Aitareya Brahmana from beginning to end, and all the Srauta and Smarta Sutras of As'valayana, and the other Vedangas or auxiliary sciences. They might be called men of collossal memory; but in India,—where memory is cultivated to an extraordinary degree, and where learned men are esteemed in proportion as they *remember* and promptly apply, from the capacious stores of their minds,

Aphoristic school.

Cultivation of memory.

LECTURE IV.

without referring to written books, all the Vedic and philosophical truths, and all the ramifying details of ceremonial and legal literature,—they excite neither admiration nor wonder. Such feats of memory are witnessed every day, and their absence alone is noticed and severely censured.

Sutras classified.

The Sutras, or aphorisms, are divided into three classes. The first class are exclusively devoted to the consideration of the ritual, and are entirely founded upon the texts of the Vedas.

The second class of aphorisms treat of domestic ceremonies, those celebrated at birth and before it, at marriage, as well as at death and after it.

The third class deal with forensic law, properly so called, and have a special interest for us. They form the basis of the legal portions of the law-books, and are the sources from which Manu and Yajnavalkya, and the other compilers of Hindu law, have largely borrowed their materials.

Dharma Sutras, or Maxims of Law.

The third class of aphorisms are known as *Dharma* Sutras. *Dharma* means Law or Justice. The Dharma Sutras, therefore, were aphoristic rules relating to law. They were legal maxims, which defined the functions of government and the duties and obligations of the different classes of society. These aphorisms were also called *Samaya-charika*. *Samaya* means time or agreement, and *Achara* means custom. These were rules which could not be said to be founded upon divine injunctions, but had grown out of the *customs*

of the *times* for the better regulation of social affairs. The legal relation between man and man, it is sometimes said, arises out of mutual *agreement*, or is deduced from approved *usages*. The appropriateness of the terms employed (*samaya* and *achára*), therefore, to designate the class of legal aphorisms under consideration, will at once be noticed.

LECTURE IV.

Fountain source of the ancient Codes.

The *Dharma* Sutras treat principally of the duties and obligations of a householder, the functions of a settled government, the administration of justice, the law of inheritance, and other matters bearing upon them. It will be seen, therefore, that these aphorisms are the foundation of Hindu law, and all the ancient Codes of law, such as those of Manu and Yajnavalkya, have not only drawn their inspiration from them, but are largely indebted to them for the materials which have been used by them.

History of Hindu jurisprudence.

It is true that, according to the Hindus, the fountain-head of *dharma*, or law, is the Veda, or revelation; but there are no special chapters in the Veda treating of law. In the *Sutras* alone we find continuous treatises devoted to this subject, and we must look to the aphorisms, therefore, for the origin of Hindu Jurisprudence. In the Vedic times, when society was composed of patriarchal families, the patriarchs administered their own law, which differed in different years according to the individual circumstances to which it was applied. When the heads of the families had supreme sway over the life and property of the

Necessity for law not felt in the patriarchal age.

LECTURE IV.

individual members, their word was law, and there was none to whom an appeal could be made in case of supposed injustice. Uniformity in the decisions of the *griha-pati*, or lord of the family, was never expected, nor aimed at. The disputes which arose between the members of the family were settled with a high hand by the head of the house, with due regard to the promotion of the family interest, before which all personal considerations had to give way. It was only when the limits of the family became enlarged, when foreign elements were introduced, and the rights of individuals were recognised as distinct from those of the family, that the need of a body of rules defining uniform conduct in different social relations was created, and supplied by the so-called legal aphorisms. It was only when the social necessities outgrew the family wants, when large classes of men transacted business with each other, and Civil Government was established to protect public interests, that the desire was felt of defining accurately the social relations, and of laying down rules for breaches of social *agreement*. Immemorial and approved custom, prevailing at the time, was the great guide of the Jurists who undertook the task of creating a body of law, which should cement the union of the different social elements, and promote the collective happiness of the different social groups and of the individual members composing them.

Felt with the extension of social relations.

LECTURE IV.

It is no wonder, therefore, that we do not find in the *Mantras* and *Brahmanas* continuous treatises treating of civil law and its different branches.

Civil Law not continuously treated of in the Mantras and Bramhanas.

When the Sutra works were composed, schools were founded which adopted them. These schools were called *Charanas*. Each school consisted of members who accepted the interpretation given in their Sutras of Vedic texts, followed the ceremonial recommended, and guided their actions by the rules laid down. They constituted a spiritual family whose bond of union was a community of sacred texts. They formed a body who were pledged to the reading of a certain *Sákha* or branch of the Veda, and who owed allegiance to one set of aphorisms, ceremonial and legal. Each school was an ideal succession of teachers and pupils, who formed a compact body, whose spiritual government was complete within itself. They had their own Sanhita, their own Brahmana, and their own Sutras. "They were ideal fellowships, held together by ties, more sacred in the eyes of a Brahmin than the mere ties of blood. They were the living depositories of the most sacred heirlooms, and on the extinction of a *Charana*, the words which were believed to be the breath of God would have been lost without hope of recovery."[1]

Sutra schools. *Charanas.*

These schools were spiritual brotherhoods, whose ideas, feelings, emotions, and prejudices moulded themselves on the pattern of those which *result naturally* from

Spiritual fraternities.

[1] Max Müller's Ancient Sanskrit Literature, p. 378.

LECTURE IV.

consanguinity. The spiritual relationship thus created was as strong as the affinity founded on the ties of blood. Different patriarchal families belonged to the same spiritual brotherhood, and as a natural consequence the ideas of patriarchal power were relaxed, and the spirit of opposition was replaced by bonds of affection and sympathy. Crude notions about individual and family relations were gradually smoothed down, and society entered on a new phase of progress.

Their number same as that of the Vedas.

These schools were divided into four classes, according to the four Vedas to which they belonged. As the Vedas had numerous branches according to their "*varias lectiones*," these schools also had corresponding subdivisions. It is stated that, during the Sutra period, the Rik had five, Yaju eighty-six, Sama one thousand, and Atharva nine such schools. The ceremonial and legal aphorisms were all cultivated by members of the Hindu community in their respective schools, and we can easily imagine what fresh life was imparted to the study of law in these shrines of sacred knowledge.

Decline of the influence of the fraternities.

We pointed out that there were two classes of aphorisms—those founded on the Veda, and those founded on tradition or custom. The second class was subdivided into aphorisms relating to domestic (*grihya*) sacraments, and those relating to law and government. All these aphorisms were equally cultivated at first in the different schools, and their

study was carried on with an earnestness and enthusiasm peculiar to the Aryans of India. For a long time the study of ceremonial and legal aphorisms was inseparable, and the *dharma sutras*, or legal maxims, held equal rank with the other aphorisms. The ceremonial aphorisms, however, belonged to religion, and the *dharma sutras* treated of civil matters. There was an essential difference between the two. The spiritual welfare of man was of greater importance than his temporal interests. It was not long, therefore, before the study of *dharma* was neglected in the schools, and the spiritual brotherhoods were exclusively engaged in the cultivation of the ceremonial branch of divine law. These brotherhoods exist to this day, but they do not consider it their duty to guard the *dharma sutras* with that jealous care which they bestow on the religious law.

The ceremonial branch of the aphorisms cultivated to the neglect of the study of legal maxims.

There was another cause which tended to the extinction of this branch of study in the various schools. Civil Government was firmly established, and the power of the patriarchal families decayed in proportion as ideas about civil rights were enlarged. The administration of law and justice was taken out of the hands of such exclusive bodies as the spiritual brotherhoods, and entrusted to tribunals established for enforcing civil obligations. With the progress of kingly power, force introduced order, and these civil tribunals monopolized the administration of law. The domination of the sovereign, granting that it was con-

Establishment of Civil Government.

20

LECTURE IV.

fined to a limited area, commanded the obedience of the people, and the development of Royal attributes diminished the influence of the spiritual brotherhoods.

Social progress destructive of priestly ascendency.

There was a third cause which powerfully operated, later on, in undermining the temporal power of these bodies of men. The laws which were framed and administered by them reserved to the priestly caste rights and privileges which were denied to the other classes of the social order. The reason is plain enough. "The *Charanas* were confined to the priestly caste," and laws were made by the members of the priestly caste. The lion's share, therefore, was taken by them, and the members of the other castes were not treated on an equal footing. The doctrine that all men are equal was repugnant to the priestly instincts, and anything that encroached upon the sacred majesty of the hereditary possessors of divine knowledge was condemned with all the force commanded by superior wisdom. With the advancement of society and the progress of civilization, however, things could not long remain in this state. "Buddhism, which originally sprung purely from theoretical heterodoxy regarding the relation of matter to spirit, addressed itself in course of time to practical points of religion and worship, and imperilled the very existence of Brahmanism. The people generally availed themselves of its aid in order to throw off the overwhelming yoke of priestly domination."[1]

[1] Weber's History of Sanscrit Literature, p. 20.

Buddha formed the grand conception of uniting the different classes of society in one common bond. He went on preaching, and teaching: "All that is born must die—the passions must be subdued, till a man is ready to give up everything, even his own self." He gave up his exalted position, and mixed with the lowest classes as his friends and equals. "My law," says Buddha, "is a law of grace. There is room for all without exception—learned or ignorant, poor or rich." Many sections of the community were excluded by the Brahmans from the communion of religion. Buddha opened wide his arms and proclaimed equality. Individual happiness, he said, was not the true object of life; to improve society, and to increase the sum total of human happiness should be the aim of every man. You are all equals, but you owe duties to each other. Thus taught Buddha, and millions obeyed his call. The people came to know their rights, and the Brahmanic influence was greatly weakened.

LECTURE IV.

Buddha.

His teachings.

Equality.

Summum bonum of life.

The sovereign, who would maintain his power, must satisfy the feelings and wants of his subjects. When these revolutionary principles took a deep root in the minds of the people, there was no alternative but to march, however slowly, with the progress of the times, and make concessions to the spirit of advancement. In spiritual concerns the rigidity of the former rules might be maintained, but in matters relating to Civil Government and the laws of property,

Effects of his teachings.

LECTURE IV.

the spiritual brotherhoods must be deprived of legislative and executive powers. The danger was imminent. Either the whole priestly order should be annihilated, or the administration of temporal affairs should be left in the hands of civil tribunals. The latter alternative was wisely chosen, and Hindu society exists to this day, unscathed by the flaming arrows of Buddhistic logic. It is a significant fact, however, that though the religious opinions of the Buddhas and Jainas of India are diametrically opposite to those of the Hindu faith, the law relating to property, and its devolution, is the *same* in both sections of the community. The law of inheritance, and the law relating to the management of joint property, is the same in the case of Hindus and Jainas, in absence of proof of special custom varying the original law;[1] and it can be clearly seen from this that when there was a rupture between Buddhists and Hindus with regard to religion and worship, the Civil Government, wresting the administration of law from the hands of the spiritual brotherhoods, impartially distributed justice without the least consideration of conflicting religious tenets.

Rules of Inheritance the same with the Hindus and Buddhists.

Neglect of the study of ancient dharma sutras.

These spiritual brotherhoods exist to this day. The aphorisms belonging to the Vedic ceremonial and the Domestic Sacraments are still their sacred heirlooms. But the *dharma sutras*, the Legal Aphorisms, have gone out of their possession. They

[1] 8 W. R., 116; 4 I. L. R., 744.

still devote their lives to the study and elaboration of the ceremonial canons, but it is not their province now to guard the Legal Maxims. The study of these Maxims has been almost entirely neglected, and their application in practice totally discontinued. These schools are the guardians of all sacred works, but since the separation of the temporal from the spiritual branch of study, the works on Law and Government have not been preserved by them with religious care. Most of the aphoristic works have been destroyed by damp and whiteants, and the surviving copies have become so rare that it is very difficult to lay hands on one. If you ask a learned *sastri* what has become of them, his invariable answer is that the works are rare, and that they do not form now a part of their sacred study. "We are enjoined to read the Veda and its auxiliary sciences, when we perform daily the Vedic Sacrament. We read extracts from them; but when it comes to the reading of the *dharma sutras*, the only words we repeat from memory are 'We will now explain the nature of Law.' This shows that originally it was our duty to study every day some portion at least of the Science of Law, but now we are free from this obligation." The spiritual brotherhoods, therefore, have now no concern whatver with the study or preservation of the ancient *dharma sutras*.

We said that the founders of the Spiritual Brotherhoods framed originally Institutes of Law for their

Administration of law in dif-

LECTURE IV.

ferent periods.

special use, but that after a time *these Institutes were not* practically enforced exclusively within the precincts of the schools. Civil Tribunals administered law, and different brotherhoods were obliged to submit to an uniform body of Law. The use of special Manuals of Law for special schools was discontinued even before the time of Gautama, the oldest of our present legal authorities. We may gain a fair idea of how law was framed and admininistered, and what authorities were respected in ancient India, from the works of Gautama and other Jurists who followed him. The interval of time between Gautama and Vrihaspati must have been very great, and the circumstances of the country which modified the primitive juridical principles must have been of a varied character. What was true at the time of Gautama could not have been authoritative at the time of Vrihaspati. But the quotations we are going to give from the different legislators will mark the progressive changes of legistion between the two periods.

Gautama.

Gautama says (Ch. 28):

Law—Judiciary.

"With regard to any point of law which is not accurately known, that decision must be followed which is pronounced by well-instructed men, who are thoroughly conversant with approved custom, who are skilled in reasoning, and who are free from covetousness.

Constitution of judicial assembly.

"That decision must be taken as law which proceeds from the mature deliberation of *an assembly* of men,

composed of the following veterans of society: four men who have completely studied the four Vedas; three men belonging to the first three orders, *viz.*, a student, a householder, and an ascetic; and three men who know the *different Institutes* of Law.

Decision of a single man learned in the Vedas.

"On failure of these, the decision of *one* learned man who knows the Veda, and is well instructed, shall be followed in disputed cases. For such a man is incapable of unjustly injurying or favoring created beings."[1]

Privileges of spiritual fraternities discontinued.

Here it will be observed that Gautama does not insist upon the practical use of special institutes of special schools. A court formed of veteran members, well-skilled in reasoning, and well-versed in laws enacted by *different* "Brotherhoods"—nay even *one* person eminent in knowledge—is fully competent to lay down the law. Special care should be taken in the constitution of the legislative body whose decision should be final. It must represent the different shades of opinion of the different orders of Brahmanical society. We observe in this that the special privileges of Brotherhoods for enacting laws for their own body were completely destroyed, and that a new order of things was introduced at the time when Gautama wrote his treatise on Law.

Brahminic influence in the legislative and judicial assemblies.

There are indications in Gautama that, in enacting laws, the Brahmans still held great influence in the councils of legislative bodies, and in the formation

[1] Max Müller's Sacred Books, Vol. II. Laws of the Aryas, by Bühler.

LECTURE IV.

of Courts for the adjudication of suits; but we see that, in the time of Apastamba, the constitution of the legislative assemblies had materially changed. The next two classes of society were freely admitted into them.

Apastamba.

"The civil conduct of a person is to be regulated by the law laid down in *all countries* by men of the *three* twice-born classes, who have been properly obedient to their teachers, who are aged, of subdued senses, neither given to avarice, nor hypocrites."[1] He goes further and declares, that the opinions of experienced *ladies*, nay even of *Sudras*, must be respected in deciding disputed legal questions.[2]

On the origin of Law.

We may remark in passing that there is one passage in Apastamba in this chapter, which entirely clears up the point as to whether forensic law was derived from the Veda, or whether it was a creation of this period. There can be no doubt that points of law were incidently noticed in the hymns and the *Brahmanas*, but their continuous and systematic discussion was reserved for the Jurists of the next social period. With regard to the origin of law during this period, Apastamba says:

Law created by social wants.

"It is difficult to learn the sacred law from the letter of the Vedas only; but by following the indications (given in the Veda) it is easily accomplished."[3]

The source of forensic law, therefore, must be sought for elsewhere than in the Veda. It was the result of

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[1] Sacred Laws of the Aryas, Apastamba, II, 11, 29.
[2] *Ibid*, II, 11, 29. 15. [3] *Ibid*, II, 11, 29. 13.

progress and the creature of circumstances. Social wants created it, and social advancement watched its formation and developed its proportions. Stationary it never has been, and never will be. It has grown with Hindu society, and will share in the vicissitudes of its growth.

Vas'ishtha.

We now come to Vas'ishtha. He is more explicit, and we shall be able to derive from him a great deal of information on this subject:

"Law has been enacted for this world and the next. If (divine or human law) is not available, approved custom has the force of law. Laws and customs which are in force in the country lying to the south of the Snowy Range and to the north of the Vindhya Mountains, should be respected and followed; but not other laws, which are fit only for the depraved and the vile. The country indicated above is known as Aryavarta. There are others, however, who say that the provinces between the Ganges and Jamuna are called Aryavarta. This is what they say: 'The sacred majesty of Brahmins is respected in the province where the black antelope roams at pleasure.' The *Bhallavins* also quote the following gatha (song) on this subject:

"'The Sindhu (Indus) flows in the west, and the sun rises (from the sea) in the east; the sacred majesty of the Brahmins is respected (in the country between the Indus in the west and the sea in the east), and where the black antelope roams at pleasure.'

LECTURE IV.

There can be no doubt that that is *law* which is laid down as such by veteran lawyers, versed in theology, philosophy, and forensic law.

"Where the Veda is silent, Manu sanctioned the laws regulating families, castes, and tribes."

Decisions of eminent lawyers.

According to Vas'ishtha, therefore, the decision of eminent *lawyers* has the force of law, and their opinion on all disputed points is authoritative, and cannot be gainsaid.

Manu.

According to Manu, legislative assemblies consisting of three persons learned in the Vedas, and presided over by a competent person, "may remove all doubts both in law and casuistry." "Even the decision of one priest," he continues, "must be considered as law of the highest authority; not the opinions of myriads, who have no sacred knowledge."[1]

Yajnavalkya and Parasara.

Yajnavalkya and Parasara are of the same opinion. They believe that *any* assembly consisting of three or four or more persons well versed in philosophy, theology, and law—nay even one person eminent in knowledge—are fully competent to lay down the law.[2]

Vrihaspati.

We will close our quotations upon this subject with the words of Vrihaspati: "Where seven, five, or three Brahmins, who know the customs of the world, and are well versed in theology, philosophy, and law, have settled, that assembly is like a sacrifice." As the performance of sacrifices leads to spiritual happi-

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[1] Manu, XII, 112, 113.

[2] Yajnavalkya I, 9; Parasara. Max Müller's Ancient Sanskrit Literature, p. 130.

ness, so the adoption of rules of conduct prescribed by the legislative assemblies, indicated above, leads to worldly happiness and glory. LECTURE IV.

Law laid down by Jurists.

One thing is quite clear from all the extracts given. The legislative power of the Spiritual Brotherhoods was completely broken, and independent Jurists eminent in knowledge were acknowledged as legal authorities entitled to the highest respect. They laid down the law which was followed in civil tribunals, and which had the force of legislative enactments. All classes of society, from the king to the most degraded Sudra, submitted to their authority, and their dictum had the same force as "the declared will of the Supreme Legislature." They were the sovereigns of ancient society entrusted with the power of making laws for the country. They must have been in most instances the presidents of legislative assemblies (*parshads*) whose word was law. They must have been, by the very constitution of these assemblies, men eminent in learning, experienced in reasoning, and well versed in prevailing customs—grey-headed seers whose word commanded respect, and who were incapable of unjustly favoring or injuring the meanest creature of the earth.

Chronological uncertainty of ancient Sanskrit works.

We will now attempt a classification of the works of the ancient legislators of India. In doing so, we must give a caution. Sanskrit philology has not yet arrived at that state of perfection, that correct dates can be assigned to ancient literary works. A

LECTURE IV.

time may come when these dates will be found, and a chronological history of India will be written. But as yet we see no signs of the approach of such a bright future. Eminent scholars, it is true, have attempted the task. But we are bound to say that their warm *imagination* has often supplied them with data which scientific research has not yet yielded.

History of ancient civilization in India divisible into epochs.

Though we have no chronological charts and manuals of ancient history in the literature of the Hindus, there are rich materials scattered in the ancient works from which there could be written a clear and accurate history of the development of the Hindu mind. Indian history can be written in epochs. There are layers of fossil thoughts which, when dug up and carefully examined, would, like the petrified organic remains of the geologists, pour a flood of light on many dark portions of Indian history. The different stages of growth of the Hindu social organization and of Hindu law could be correctly indicated, and a broad and full impression given of ancient Hindu civilization.

Possibility of determining the relative ages of ancient law-givers.

We must not, however, try at present to find accurate dates—which cannot be checked by scientific analysis — for the works under consideration. Our task will be fairly done if we restrict ourselves to the determination of the *relative* ages of the ancient legislators. There were legislators more ancient, and less ancient, and if we can find the *relative* order in which they promulgated their laws,

sufficient data will be collected to enable us to describe the gradual development of the Law of Inheritance, the subject of the present course of lectures. The materials in hand are meagre, but they will help us to fix *approximately* the relative ages of the Jurists.

Mantras older than Brahmanas, which again are anterior to Sutras.

The Sutras presuppose the existence of the Brahmanas, which have been mentioned by name in the aphoristic works.

The Brahmanas again presuppose the existence of the mantras of the Sanhitas of the Vedas.

The mantras, therefore, are anterior to the Brahmanas, and the Sutras are younger than the Brahmanas.

Mantra period.

The chronological limits assigned by Professor Max Müller are 400 years—from 800 to 1200 (B.C.)—to the mantra period; and in his opinion it would be impossible to bring the whole Brahmana period within a shorter space than 200 years. He has given 400 years to the Sutra period, extending from 200 to 600 (B.C.)

We must take these dates with a large amount of reservation. The great scholar himself, to whom Sanskrit philology is eternally indebted, does not seem to be very sanguine about the accuracy of the chronological limits assigned by himself. They will serve, however, one good purpose. We shall know by means of them how to rein in our imagination, when — seeing before us the vast densely populous tract, where an infinite number of distinguished

LECTURE IV.

men of *all* ages mix promiscuously together—we try to assign relative positions to them in our table of precedence.

Sources of Hindu law 1. Veda.

The Veda then is the primary source of Hindu law.

2. Smritis.

Next to the Veda, the second great source of Hindu forensic law are the Institutes, or Manuals known by the collective name of Smritis. The authors of these Smritis are the great mediæval authorities on Hindu law. These authors are known as *Rishis*, or sages.

Yajnavalkya and Parasara mention the names of *twenty* such sages.

Padma Purana gives the names of thirty-six.

Old law-givers.

Modern research has found fragments or complete copies of upwards of one hundred legal works which are ascribed to ancient legislators. The quotations from most of these authorities are met with in commentaries and digests.[1]

Yajnavalkya's list.

Yajnavalkya gives the following list :—

1. Manu.	11. Katyayana.
2. Atri.	12. Vrihaspati.
3. Vishnu.	13. Parasara.
4. Harita.	14. Vyasa.
5. Yajnavalkya.	15. Sankha, Likhita.
6. Us'ana.	16. Daksha.
7. Angira.	17. Gautama.
8. Yama.	18. Sátatapa.
9. Apastamba.	19. Vasishtha.
10. Samvarta.	

[1] In the Nirnaya Sindhu alone, Kamalákara refers to 131 Smritis ; and Ananta Deva, in the Sanskára Kaustubha, quotes 104. Besides these, other Smriti passages are given, but their authors are not named.—*V. Mandalik*.

Parasara omits the names of Yama, Vrihaspati, and Vyasa from the above list; and adds the names of Kasyapa, Gargya, and Pracheta. LECTURE IV.

The Padma Purana, leaving out the name of Atri in Yajnavalkya's list, completes the number thirty-six abovementioned by adding Padma Purana's addition.

20. Marichi.
21. Pulastya.
22. Pracheta.
23. Bhrigu.
24. *Narada.*
25. Kas'yapa.
26. Visvamitra.
27. *Devala.*
28. Rishyasringa.
29. Gargya.
30. *Baudhayana.*
31. *Paithinasi.*
32. Jabali.
33. Sumantu.
34. Paraskara.
35. *Laugakshi.*
36. Kuthumi.

It may be mentioned here, for convenience of reference, that, in the modern Digests of Hindu Law—*viz.*, Dayabhaga, Mitakshara, and the other text-books of the different schools—extracts are met with from all the authorities mentioned by Yajnavalkya; and in the list given by the Padma Purana, quotations frequently occur from Baudhayana, Paithinasi, Narada, and Devala. The name of Laugakshi also is not uncommon.

Of all the legislators mentioned above *four* of them have been considered as principal authorities each in one of the four ages of the world—*viz.*: Four principal authorities.

1. Manu in the *Krita*, or first age.
2. Gautama in the *Treta*, or second age.
3. Sankha in the *Dvapara*, or third age.
4. Parasara in the *Kali*, or the present age.

Lecture IV.

This distinction, however, is not observed in practice.

Several treatises are sometimes ascribed to the same author. His greater or lesser (Vrihat or Laghu) Institutes; or a later work of the same author when old (Vriddha).[1]

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[1] In noticing Mr. V. N. Mandalik's valuable work on Hindu Law, Dr. Rajendralala Mitra, whose ripe Sanskrit Scholarship is held in universal esteem, remarks:

"The Hindu belief is that, like those of everything else, the sources of Hindu civil law are the Vedas; but for all practical purposes they may be altogether kept out of sight. They do not treat of law. Next to them the Sutras,—the Grihya, the Dharma, and the Samayacharika texts,—are the most important. Each master of a Sakha prepared a set of rules for the guidance of the followers of his school, and these codes are always referred to as the primary sources of law and custom. Next came the Smritis, of which the most approved are 20 in number; but many more are still extant, and mediæval writers quote even a greater number. Dr. Stenzler enumerated 46 of these. Dr. Bühler prepared a list which included 78 names; but Mr. Mandalik shows that Nilakantha, in his 12 Mayukhas, has quoted from no less than 97 authors of Smritis. Some of these texts have the epithets *Vriddha* 'old,' others *Brihat* 'large' added to them, and Mr. Mandalik discusses at length the questions as to—1st, whether the two words are synonymous; and 2nd, whether the works so named have a common basis. The first he decides in the affirmative, 'because the use of Brihat by some treatise-writers and of Vriddha by others, in citing one and the same text, is a proof that they were used synonymously.' This, we think, is not conclusive. As different recensions of one author, it is by no means extraordinary that all or some of the recensions should include the same verse. Take for instance Manu. The Bhrigu text, the Brihat text, and the Vriddha text, are all presumed to contain the same matter with additions or alteration in some parts, and in quoting from one recension an author by no means implies that the excerpt does not occur in others, and to assume that it does, is to assume more than the premiss would justify us to do. With reference to the second question, Sulapani and Viramitrodaya hold that the epithets imply different periods in the lives of the same authors. Mr. Mandalik demurs to this. He says:

"'This theory, plausible as it does look, does not commend itself to my judgment: (1), because it leaves out of account the names which have Brihat prefixed to them; (2), because it is inconsistent with the special mention of Vriddha Satatapa in the opening verse of the Smriti found under that name in the University Collection, and of Vriddha Gargya in

It is singular that Yajnavalkya and Parasara mention their own names as *authorities* on law. It may be mentioned once for all that the Smritis have been frequently recast, and the probable explanation of this singular practice is, that the text-books, like the dialogues of Plato, were compiled by pupils from the oral instructions of their masters.[1]

LECTURE IV.

Text-books compiled from oral instruction.

All the Institutes of law may be classified as follows :—

Institutes of law classified.

I.—*a.* Dharma Sutras, or Aphorisms of law.

b. Fragments of Aphoristic treatises.

II.—Metrical Redactions of Dharma Sutras.

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the Mahabharata Anusasanika Parva (l. 165, p. 1, line 15), where the whole name appears clearly as the designation of one individual; (3). the indiscriminate use of *Brihat* for *Vriddha* would be unaccountable if Vriddha is interpreted as signifying 'old,' as Messrs. West and Bühler have done (see their Introduction, p. 16, note *a*, to the Hindu Law, second edition). For these reasons I am inclined to hold that such works are productions of different individuals, and that their being named after the same author is due to the one being an expansion or an epitome of the other. I am confirmed in this opinion by a likelihood of the terms *Brihat* and *Vriddah* being epithets more of the works than of the authors, just as a similar prefix *sloka* (metrical) in words like sloka-Gautama and sloka-Vasishtha undoubtedly is.'

"To us the solution appears to lie in a different direction. It is certain that the texts of Manu and Yajnavalkya, as we now have them, are metrical redactions from ancient and now lost texts, probably the Grihya and the Dharma Sutras; and in the Introduction to Bhrigu's edition of Manu it is distinctly mentioned that before it there existed other and more extensive recensions. The same fact is also indicated in the introductory portions of some of the other Smritis, and the obvious conclusion is that the principles inculcated by Manu and others in their Grihya, Dharma, and Samayachara Sutras (mostly now lost) were put in digests (mostly metrical), and of these the oldest got the name of *Vriddha*, and the largest *Brihat*, while the smallest got currency under the name of the author without any distinctive epithet."—*Hindoo Patriot, August* 9, 1880.

[1] Mitakshara, I, 1.

LECTURE IV.

III.—*a.* Independent Metrical or Prose treatises.
b. Fragments of Metrical treatises.

In the first class may be mentioned the Dharma Sutras of

(*a*) 1. Gautama.
2. Baudhayana.
3. Apastamba.
4. Vas´ishtha.

(*b*) 5. Harita.
6. Yama.
7. Sankha.
8. Parasara (and perhaps).
9. Us´ana.
10. Paithinasi.

In the second class

Manu stands pre-eminent. There must have been others, but it is difficult to find them.

In the third class, we may mention

(*a*) 1. Yajnavalkya.
2. Narada.
3. Vishnu, in prose and verse intermingled.

(*b*) 1. Devala.
2. Vrihaspati.
3. Katyayana.
4. Vyasa.

We make no mention of Satatapa. The quotations from Satatapa we meet with are in verse. He must have belonged to a period posterior to Manu. His place would, probably, be before that of Devala.

We do not include in this classification works known as Smritis, but which do not contain chapters on civil law.

LECTURE IV.

There is a consensus of opinion among Sanskrit philologists that works written in the Sutra style are anterior in origin to the treatises written in verse. In the opinion of Dr. Max Müller, metrical treatises on law belonged to the age which followed the last period of the Vedic age: "We never find," says Dr. Bühler, "a poetical work at the head of a series of scientific works, but always a Sutra, though at the same time the introduction of metrical handbooks did not put a stop to the composition of Sutras." There is thus a natural division between two classes of legal treatises which belong to two different periods.

The Sutra works will first of all form the subject of our consideration.

Relative ages of four principal law-givers.

Let us first try to find out the relative ages of the four legislators—Gautama, Baudhayana, Apastamba, and Vas'ishtha,—complete copies of whose works are now extant.

Gautama first in order.

Both Baudhayana and Vas'ishtha quote Gautama as an authority on law, and the passages quoted by them are found in the copy of Gautama we possess.[1] This affords a strong presumption that Gautama was older in point of time than either of the others.

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[1] Baudhayana I. 1, 17—24 ; Gautama, XI, 20 ; Vas'ishtha. IV; Gautama. XIV, 44.

Lecture IV.

Baudhayana on Penance and Expiation.

The chapter on Penances and Expiation[1] is common to all the three lawgivers. Gautama's treatment of the subject is methodical, and the logical sequence of the aphorisms is clearly established, while Baudhayana discusses the subject in an offhand manner, and the connection between the aphorisms is anything but apparent. He does not bestow the same care and attention upon this matter, as he does upon the other portions of his work. He evidently believes that he is not responsible for the logical accuracy of the propositions advanced, that it is not his duty to see that all the different parts of the arguments closely fit in with each other, and that the line of reasoning is compact and unassailable. Gautama's authority on penances and expiation, he probably thought, was universally acknowledged, and in whatever way the arguments might be presented to the audience, their force, he believed, would at once be seen, and their soundness admitted.

Comparison with Gautama.

Baudhayana introduces some new readings in these passages. These *variæ lectiones* are in no way better than those found in Gautama. They are corrupt, and are evidently the result of carelessness and inattention. Gautama's aphorisms give a better sense than those of Baudhayana with these new readings.

Vas'ishtha.

Vas'ishtha also, as we said before, contains the same aphorisms on penance and expiation. The remarks we made with reference to Baudhayana apply equally

[1] Gautama, XIX; Baudhayana, III; Vas'ishtha, XXII.

to him. In the case of Vas'ishtha the charge assumes a much more aggravated form. He omits the connecting links between the different aphorisms, and thus the character of the whole subject is entirely changed. The arguments present a sort of shadowy appearance, and a casual observer would not take them to be the creations of the mind which had produced the rest of the work.

His second-hand reproduction of Baudhayana's aphorisms.

Vas'ishtha could not have borrowed his aphorisms *directly* from Gautama—the original source. His was evidently a second-hand reproduction. He has copied the corrupt readings of Baudhayana, and in several cases has made them worse. As a report passing through different channels gradually changes its character till its paternity can be distinguished with difficulty, so Vas'ishtha's aphorisms on penances and expiation, though they have not passed through many hands, exhibit all the traces of a borrowed production. The errors of Baudhayana appear in a much more glaring form, and the conclusion is irresistible that Vas'ishtha is indebted to the latter for his disquisition on penances and expiation.

Both Baudhayana and Vas'ishtha posterior in date to Gautama.

If this fact be taken in connection with the statement that both Baudhayana and Vas'ishtha recognize Gautama as an authority on law, it will rebut the argument that all the three legislators might have borrowed from a common source, and would also strengthen the proof of Gautama's priority to both these lawgivers.

LECTURE IV.

Similarity of Apastamba's and Baudhayana's doctrine.

This question will gain additional support if we consider the relation of Apastamba's aphorisms to those of Baudhayana and Vas'ishtha. Apastamba does not mention any of these Jurists by *name.* But any one reading his work will be struck with its resemblance on some points to that of Baudhayana. The controversial spirit of some of the aphorisms is very remarkable; and this spirit of controversy can be explained and understood only by a reference to the writings of Baudhayana. The fact that they belonged to the same Vedic school, Black Yajur Veda, might in some measure account for the resemblance of the doctrines advocated, but could not explain all their characteristic *differences.*

Occasional conflict of their opinions.

There are many subjects on which their opinions are conflicting. The views of Baudhayana are liberal, and are conformable to those of Gautama and the teachers who preceded him. Apastamba controverts those doctrines with all the rancour of a puritan. Society had advanced a step further, and with the advancement of the social organization, thought Apastamba, the latitude of the old social customs should be restricted. Primogeniture, in his opinion, was a relic of the old constitution. With the disintegration of the individual from the corporate family, the equality of the right of sons of the same father to the paternal inheritance must be acknowledged. The ancients recognized twelve classes of sons. Social *necessity*, argued Apastamba, might have excused

the admission of such a doctrine. It might have been necessary at a time when there was a scarcity of fighting men for the support of the State; when numerical strength was a *sine qua non* of the independent existence of a joint undivided family. The fiction of consanguinity as a bond of union of all the members of the joint family might have tied together in a remote age the different elements composing such a social group; but the time had come, he believed, when such a fiction should not be taken as the basis of society. Polyandry, in the disguise of *niyoga*, or raising issue by a sister-in-law, for the sake of alleged spiritual benefit, and the custom of selling and deserting one's lawful issue, is revolting to human reason, and should be strongly condemned. The Vedic texts, he said, are wrongly cited in support of these barbarous customs; the breath of God could never have permitted these atrocious institutions. The Vedic texts have been wilfully misinterpreted to suit interested views.[1]

Apastamba's attempt at overthrow of Baudhayana's conservatism.

It will be seen that Apastamba was a revolutionist to the backbone, and was determined to replace the old order of things by more refined and civilized institutions. If we read his aphorisms side by side with those of Baudhayana, the warmth of his language becomes at once intelligible. It was Baudhayana who, deriving his principles from Gautama, supported them with fresh arguments, and established

[1] Apastamba, II.

LECTURE IV.

them as rules of social conduct. It was against Baudhayana then, the famous teacher of the old school, that this volley was directed. The very language of Baudhayana is quoted to controvert his views and to show his fallacy. He defers to his opinion where it is consonant to reason and morality, but strongly differs from him when Baudhayana's views seem to be repulsive to advanced ideas regarding the social organization. Aphorism after aphorism is taken word for word from Baudhayana, thus showing that the authority of Baudhayana was respected in all matters where Apastamba's views coincided with those of the older teacher. But where they were repugnant, according to Apastamba, to the spirit of progress, they should be mercilessly exposed. There can be no doubt, therefore, that the principles of morality taught by Baudhayana belonged to an older order of ideas than the stricter views of Apastamba. "If Apastamba," says Dr. Bühler—who has with remarkable ability discussed the question of the relative ages of the four legislators mentioned above, and whose lead we have followed—"does not mention Baudhayana by name, the reason probably is that, in olden times, just as in the present day, the Brahmanical etiquette forbade a direct opposition against doctrines propounded by an older teacher who belongs to the same spiritual family as himself."

Dr. Bühler on the chrono-

"Three points," says the learned Doctor, "*viz.*, the identity of a number of Sutras in the works of

logical precedence of the two sages.

the two authors, the fact that Apastamba advocates on some points more refined or puritanical opinions, and that he labours to controvert doctrines contained in Baudhayana's Sutras, give a powerful support to the traditional statement that he is younger than that teacher. It is, however, difficult to say how great the distance between the two really is. Mahadeva places between them only Bhâradvâja, the author of a set of Sutras, which as yet have not been completely recovered. But it seems to me not likely that the latter was his immediate predecessor in the Vidyâvansa, or spiritual family, to which both belonged. For it cannot be expected that two successive heads of the school should each have composed a Sutra and thus founded a new branch school. It is more probable that Baudhayana and Bhâradvâja, as well as the latter and Apastamba, were separated by several intervening generations of teachers who contented themselves with explaining the works of their predecessors. The distance in years between the first and the last of the three Sûtrakâras must therefore, I think, be measured rather by centuries than by decades."

Apastamba's priority to Vas'ishtha.

Of Apastamba and Vas'ishtha, we believe the latter was younger than the former. We will state the grounds of our belief. We will again appeal to internal evidence to support our position.

Established by arguments.

By a careful examination of Vas'ishtha's Institutes, it is quite clear that Vas'ishtha was a representative

LECTURE IV.

of the old school, and the main object of his treatise was to defend the doctrines of Baudhayana and the other old teachers against the attacks of Apastamba. Vas'ishtha was a conservative, and an advocate of the good old times. He would not disturb the institutions hallowed by time, and scout the idea of introducing reforms. Apastamba was a revolutionist, and his views about the existing social customs were opposed to the teachings of ancient Jurists, whose laws in these matters were implicitly obeyed. Vas'ishtha was a staunch supporter of the ancient doctrines, and laboured to controvert the arguments of Apastamba.

Their views as to different kinds of sons.

First, as regards the twelve kinds of sons. Gautama and Baudhayana allowed "the affiliation of eleven kinds of substitutes for a legitimate son. Illegitimate sons, the illegitimate sons of wives, the legitimate and illegitimate offspring of daughters, and the children of relatives, or even of strangers, who may be solemnly adopted, or received as members of the family without any ceremony, or be acquired by purchase, were all allowed to take the place of legitimate sons. Apastamba declares his dissent from this doctrine, he allows legitimate sons alone to inherit their father's estate and to follow the occupations of his caste, and he explicitly forbids the sale and gift of children."[1]

Views of

Now let us see how the subject is treated by the

[1] Max Müller's Sacred Books, Vol. II, Sacred Laws of the Aryas, Apastamba, II, 5, 13.

other three legislators. Gautama simply enumerates the twelve classes of sons, and assigns them shares in the paternal inheritance. He does not define the nature and position of each of these classes, nor does he determine the relation which each class bears to the other.[1] Baudhayana enters more fully into the subject,[2] and defines with precision the rights and the nature and character of each class of sons. It was the law of Baudhayana from which Apastamba expressed his dissent. The legitimate son alone, according to him, is entitled to social recognition. He alludes to the illegitimate sons of wives, but makes a reference to them simply to condemn the practice. The adoption and gift of children is strictly prohibited. The selling and buying of children should, on no account, he says, be recognized or encouraged as an approved practice.[3]

LECTURE IV.

other legislators.

His language on all these points is very strong: "Transgression of the law and violence are found amongst the ancient sages. They committed no sin on account of the greatness of their lustre. A man of the later times who seeing their deeds follows them, *falls*."

Vehemence of Apastamba's language.

"You tell me," he says, "that the practices I condemn were followed by ancient sages. They might have been so. These sages were the giants of a former generation, who were privileged to do things which men of the present times, weak and imbecile as they are,

[1] Gautama, XIX. [2] Baudhayana, II, 2. [3] Apastamba, II, 6, 13.

Lecture IV.

must not for a moment attempt. We do not possess their superhuman powers, why should we then appeal to them and take them as standards of our actions. A pigmy cannot be compared to a giant. If you follow them, you are sure *to fall* into the regions of eternal torments. Their laws were not meant for you; you are inferior to them in every respect; you must have a separate set of laws for your guidance." Thus Apastamba must have argued, and society was in a state of ferment on account of the revolutionary doctrines of this great teacher.

Vas'ishtha's advocacy of ancient institutions.

Vas'ishtha furbishes the old weapons, and comes forward with a large array of Vedic texts and approved legal precedents. He appeals to immemorial customs and to the antiquity of the institutions of his time. The affiliation of eleven kinds of substitutes, mentioned by Gautama and Baudhayana, is condemned. Such condemnation, he believes, is unreasonable, and disrespectful to the ancient sages. "There are *certainly* twelve kinds of sons, he says; there *cannot be the least doubt* about it. They are *approved* by *ancient* sages."[1] In ancient times such sons were recognized; the ancients were certainly wiser than the moderns; and the institution has their approval. Apastamba is wrong, all the twelve classes of sons must receive social recognition. This is the substance of Vas'ishtha's remarks. Now, no one would ever say with regard to an undisputed proposition, whose

[1] Vas'ishtha, XVII.

truth is universally acknowledged, "it is certainly true, there can be no doubt about it." It is only when the truth of the proposition is called in question, that a man would lay stress upon the proposition he enunciates, and would use two determinative particles (*eva* and *hi*) to strengthen his position. Gautama laid down the law, Baudhayana supported him; Apastamba attacked their arguments, expressed his dissent, and laid down a different law. Vas'ishtha comes in as an advocate of the former legislators, demolishes the arguments of the latter, and says, that what the former laid down was *certainly* true, *there could be no doubt* about it. LECTURE IV.

Baudhayana on illegitimate sons.

With regard to the much vexed question of the propriety of giving social recognition to illegitimate sons of wives, we hear Baudhayana say:[1] "He who is begotten by another person on the wife of a deceased man, or on the wives of an eunuch, or of one incurably diseased, is called 'the son begotten on a wife.' Such a son has two fathers, and belongs to two families; he has a right to present the funeral oblations, and to inherit the property of his two fathers." According to Baudhayana then society is bound to recognize the illegitimate sons of wives, and to give them the same rank as the sons of the body born in lawful wedlock. He sees no impropriety in the usage, and attaches no stigma to such offspring.

[1] Baudhayana, IV. 2.

LECTURE IV.

Confuted by Apastamba.

Apastamba sets his face against such an immoral practice.

"If a man," says he, "approaches a woman who has been married before, or has not been legally married to him, they both commit a sin. A son also who is begotten of such a woman is exceedingly sinful. The Brahmanas say: 'the son belongs to him who begot him.'" Language cannot be more explicit than this in condemning the practice of polyandry, and no arguments are required to show that Apastamba's point of view was more advanced than that of Baudhayana.

Vas'ishtha sides with Baudhayana, and introduces the subject by asserting[1] that "there is a dispute among the wise. Some say 'the son belongs to the husband of the wife,' and some say that 'the son belongs to the begetter.'" Baudhayana has made a compromise, and given the son so begotten both to the begetter and the husband of the wife. Baudhayana is quite right, he says, and quotes a Vedic text, the same which is quoted by Baudhayana and alluded to by Apastamba in support of the argument. He draws also upon the animal kingdom for a precedent and an illustration. He brings again the Veda to his aid, and adds the following text in confirmation of his views:

"If amongst many brothers, who are begotten by one father, one has a son, they all have offspring

[1] Vas'ishtha, XVII.

through the son; thus says the Veda." What possible connection this has with the subject of recognizing the illegitimate sons of wives, we are unable to perceive. But this much is quite clear, that Vas'ishtha labours hard to controvert by arguments, relevant and irrelevant, the puritanic views of Apastamba, and to uphold the old laws on this subject laid down by Gautama and Baudhayana. LECTURE IV.

We come now to the principles enunciated by these legislators with regard to "sons adopted," "sons bought," and "sons self-given." Conclusion.

Baudhayana recommends the practice, and gives his sanction to it.[1] Apastamba dismisses the discussion of the subject by the following curt and laconic sentence: "The gift or acceptance of a son, and the right to buy and sell a child, is *not recognized*."[2]

Vas'ishtha grows wroth at this language, so disrespectful to Baudhayana and the other teachers; and devotes a whole chapter to the establishment of the legality of the custom of *adopting* the children of strangers. He appeals also to divine revelation to hold up to ridicule and abhorrence the silent contempt shown by Apastamba to eminent teachers. But supported by Vas'ishtha.

The prohibition of Apastamba, he must have urged, to *adopt*, buy, or *sell* a child is not entitled to respect. "A son is born of the flesh and blood of his parents, and his parents are the cause of his very existence.

[1] Baudhayana, IV. 12. [2] Apastamba, III. 4.

Lecture IV.

His parents, therefore, have every right, either to give him away, to sell him, or abandon him."[1]

This, thought Vas'ishtha and all his followers, was an unanswerable argument. The absolute power of the father in a patriarchal family could not be called into question, and this line of reasoning had a powerful effect in stopping the current of revolutionary ideas of the Apastamba school of law. With reference to "sons bought" and "sons self-given" he invokes the authority of the Veda. The validity of the law in this respect has been declared by the story of Sunahsepha: "Harischandra, in truth, was a king. He bought the son of Ajigarta, who sold his son!"

"Sunahsepha, in truth, when tied to the sacrificial stake, praised the gods; the gods loosened his bonds. To him spoke each of the officiating priests: 'He shall be my son.' Visvamitra was the hotri-priest at that sacrifice, he became his son." Thus the law as to the validity of self-given sons is solemnly declared by divine revelation itself.

It will be evident from all that we have said above, that Gautama was the oldest of these four legislators.

Baudhayana was younger than Gautama;
Apastamba followed Baudhayana; and
Vas'ishtha was the youngest of them all.

Apastamba's native place.

It will not be out of place here to say that, in the opinion of Dr. Bühler, to whom we are largely indebted for our facts and arguments, Apastamba was

[1] Vas'ishtha, XV.

a native of the Andhra country in the Deccan, and that he probably flourished in the third century before Christ. We will not make any suggestions of our own, beyond stating that, if the accuracy of the date be established beyond question, it will be a material help in finding out the time when the other legislators published their works. LECTURE IV.

Sutra works.

We now come to *Sutra* works, which exist only in fragments. They have no independent existence of their own. They have only a sort of shadowy existence. We do not see them in flesh and blood. They exist in the mouths of others. We find them only in quotations. But their existence cannot be ignored. They are quoted as great authorities on law, and supply important links in a historical investigation.

Sages of the aphoristic period.

Let us first of all consider the claims of Harita, Yama, Sankha, and Parasara as legislators belonging to the aphoristic period of the legal literature.

Internal evidence as to their priority to Manu.

Harita is quoted by Apastamba and Vas'ishtha. We have no means of verifying these quotations. But the extracts from Harita, which we find in the Mitakshara, Dayabhaga, and other modern Digests, are all in aphoristic form. They possess all the characteristics of the aphoristic style, and lead us to the conclusion that they must have formed portions of a larger work written originally in Sutras.[1] Judging by internal evidence also, we find that the ideas expressed belong to an order of society anterior to that of Manu.

[1] Dayabhaga, I, 42, 57.

LECTURE IV.

Harita.

We find Harita sometimes quoted in the singular, and sometimes in the plural number.[1] This shows that Harita was the founder or a teacher of a school, and his work was used as a manual of law by the members of his school. This assertion is supported also by the fact that a Harita school is mentioned as belonging to the Black Yaju, and ancient works belonging to this Veda mention him repeatedly as a great authority on theological and other subjects.

Yama.

Yama is quoted by Vas´ishtha, but the remarks we made about the outward aphoristic form of Harita do not exactly apply to him. We generally find Yama in a metrical dress. The reason can be explained. He did not write his treatise in aphoristic prose, but in aphoristic verses. Vas´ishtha quotes him as a versifier, and says, that he will quote his 'gathas' or 'slokas.' Vas´ishtha, therefore, was perfectly aware that Yama's work was in verse. It need not, therefore, excite any wonder, that although Yama's treatise was in a metrical dress, we still rank him as a legislator who flourished before our present Manu. We may remark by the way that, in the original Manu also, quoted by Gautama and others, there must have been verses mixed with aphoristic prose, for Vas´ishtha quotes 'verses' from him.[2]

Sankha.

It is difficult to determine the exact position of Sankha in our table of precedence. Judging from the outward form of the quotations we meet with, Sankha's

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[1] Vas´ishtha, II. [2] *Ibid*, III, XII, XIX.

work must have belonged to the Sutra period of legal literature. All the distinctive marks of the aphoristic style are visible here, and the social customs described do not differ much from those mentioned by Vas'ishtha. We should be justified, therefore, on the strength of these external and internal criteria in placing him immediately after Vas'ishtha.

LECTURE IV.

Current edition of his work written in prose not referable to Sutra period.

Our difficulty, however, arises from the fact that the treatise, which is ascribed to Sankha, and is still extant, contains many passages which are found extracted in the Mitakshara and other Digests. There are again other passages—included among quotations from Sankha—which are not found in our edition. The question is, how should we explain the occurrence of these former extracts in a work which is evidently the production of a stranger hand. The present treatise again is in verse. But there are two chapters, the eleventh aud the twelfth, which are partly in prose and partly in verse. Dr. Bühler supposes that the prose portion consists of genuine Sutras taken from the original edition of Sankha, the whole of which must have been written in aphorisms. We do not agree with the learned Doctor in his estimate of the present edition of Sankha. A little critical examination will show that the prose portions he speaks of are not written in the Sutra style at all. They read like the easy flowing classical prose of Vishnu Sarma's Hitopodesa, and can by no means be dignified by the name of Sutras. The prose portion of the

LECTURE IV.

eleventh chapter sings the praises of *gayatri*, the well-known hymn to the holy light, "the offspring of heaven first born." The prose portion of the twelfth chapter enjoins funeral oblations to paternal and *maternal* ancestors.[1] The mere fact of its mentioning *maternal* ancestors as persons entitled to funeral cakes would be fatal to its claim as part of a *Sutra* work. It may be remembered that, previous to the age of Yajnavalkya, not one of the legislators ever mentioned *maternal* ancestors in connection with the Sraddha ceremonies. Had any mention been made before the time of Manu of these ancestors as persons to whom *pindas* were due, surely Manu, the father of modern lawgivers, would have alluded to the circumstance, and would have enjoined upon daughter's children the duty of celebrating the names of their maternal grandfather and maternal uncles at the anniversaries of their death.

Probability of the name of its author being fictitious.

It is difficult, we admit, to account for the appearance of a few *prose* sentences in a legal work which is written in verse from beginning to end. Account for it in any way we can, it is impossible, from the considerations mentioned above, to ascribe the present work to the Sankha of the pre-Manu age. *Some* of his aphorisms, it is very probable, have been versified, and sanctified by the name of the great sage, but the greater portion of the present edition bears a *fictitious* name,

[1] Jivananda Vidyasagara Ed., Vol. II, p. 359.

which does not bear the remotest resemblance to the Sankha of the Sutra period, one of the members of the sacred brotherhood of Gautama and Vas'ishtha. LECTURE IV.

Parasara.

The age of Parasara also puts the critical acumen of the Sanskrit philologists to the test. The vexed question of the period in which the sage flourished cannot be satisfactorily settled. Parasara is acknowledged as the highest authority in the fourth age on all matters relating to ritual, religious worship, domestic sacraments, and civil law. His work, it is believed, is specially composed for the requirements of the *kaliyuga*, the present mundane age. The treatise on law, however, is lost, and the few extracts we find from him in the modern Digests and Commentaries, are all that remain behind to remind us of his great work. Two books *in verse* treating of *achara*, or ritual, and *prayaschitta*, or rules regarding penance and expiation, are still extant; but there is every reason to suppose that the original work was written in *Sutras*, and that the two books now extant are only metrical editions of the original treatise. This supposition gains strength from the fact that the rules relating to Inheritance, which bear the name of Parasara, and which are extracted in the Digests and Commentaries, are in aphoristic style. We would specially refer you to the maxims quoted by Jimutabahana in determining the right of an unmarried daughter to the paternal inherit-

Books on ritual and expiation bearing his name, are the metrical editions of the original.

LECTURE IV.

ance.[1] That this maxim is written in the Sutra style cannot for a moment be doubted.

The period in which he lived.

There is a well-known tradition that Sankha promulgated his laws for the third (*dwapara*) age, and Parasara was *the* lawgiver of the fourth (*kali*) age. In other words, Parasara flourished during a period which was subsequent to that of Sankha. This tradition, coupled with the facts mentioned before, give a strong probability to the supposition that Parasara, like Sankha, flourished before Manu and Yajnavalkya.

Third class of legal treatises.

Let us now examine the third class of legal treatises—the metrical redactions of Sutra works. Manu is the great representative of this class of works:

Manu.

"The Code of Manu," says Max Müller, "is almost the only work in Sanskrit literature which, as yet, has not been assailed by those who doubt the antiquity of everything Indian. No historian has disproved its claim to that early date which had, from the first, been assigned to it by Sir William Jones. It must be confessed, however, that Sir William Jones's proofs of the antiquity of this Code cannot be considered as conclusive, and no sufficient arguments have been brought forward to substantiate any of the different dates ascribed to Manu, as the author of our law-book, which vary according to different writers, from 880 to 1280 (B.C.)"

[1] Dayabhaga, XI, 2, 3.

As we said before, the attempt to fix chronological dates cannot, in the present state of Sanskrit philology, lead to any satisfactory result. These dates become an *ignis fatuus* to Sanskritists, which, by its illusory light, leads on to bogs and marshes from which they find it difficult to extricate themselves.

LECTURE IV.

Calculation of the period in which he lived.

We may apply the remarks of Max Müller as to the accuracy of Manu's date to the calculations of Stenzler and Lassen, with regard to the date of Yajnavalkya. According to them, Yajnavalkya flourished in the period between Buddha and Vikramaditya. We will state the results of their calculations:

Results of computation made by scholars.

"1. Reference is made in Yajnavalkya's Code to Buddhist habits and doctrines, *viz.*, the yellow garments, the bald head, and the abstraction of mind peculiar to the Buddhists.[1] Hence this Dharma Sastra must have been promulgated later than 500 (B. C.)

"Reference is made to a previous Yoga Sastra promulgated by Yajnavalkya.[2] Now, the Yoga philosophy was first shaped into a system by Patanjali, who probably flourished about 200 (B. C.)

"Mention is made of coin as nanaka.[3] Now the word *nano* occurs on the coins of the Indo-Scythian king, Kanerki, who reigned until 40 (A. C.)

"This result, though indefinite, places the earliest date of Yajnavalkya's Code towards the middle of the first century after Christ."[4]

[1] Yajnavalkya, I, 271, 272, 349. [2] III, 110. [3] II, 241.
[4] Roer and Montriou, Pref. to Yajnavalkya.

LECTURE IV.

Their mode of calculation not satisfactory.

The bases on which these calculations and hypotheses, says Dr. Bühler, "are grounded, are too slender to afford reliable results, and it would seem that we can hardly be justified in following the method adopted by Lassen and others. The ancient history of India is enveloped in so deep a darkness, and the indications that the Smritis have frequently been remodelled and altered, are so numerous, that it is impossible to deduce the time of their composition from internal or even circumstantial evidence."

A similar attempt at fixing the date of Narada.

An attempt has been made to fix also the date of Narada's law-book by Professor Jolly of the Würzburgh University. We will give his exact words. This law-book, he says, "must have been composed or brought into its present shape at a time when the faith of Buddha had not merely begun to succumb to the victorious assaults of the Brahmins, but when it had been completely replaced by the old Brahmanical system. It may be added, that the opinion here expressed as to the relative antiquity of Yajnavalkya and Narada is not only confirmed by Mayr's investigations on the law of Inheritance, but also by the authority of Stenzler, who takes none of the other lawgivers except Manu to have been prior to Yajnavalkya. The two facts that the Institutes of Narada must be of later date than those of Manu and Yajnavalkya, and that they must have been composed decidedly after the beginning of the Brahmanical reaction against Buddhism, help us to

fix their earliest possible date at about 400 or 500 (A.D.)"

LECTURE IV.

Manu older than Yajnavalkya, and Narada younger than the latter.

We have expressed our doubts as to the accuracy of the *dates* assigned to Manu, Yajnavalkya, and Narada; but we entertain no doubts whatever as to their *relative* ages. Manu, we believe, preceded Yajnavalkya, and the latter, there is every reason for making the assertion, was older than Narada.

Metrical composition characteristic of this period.

All these works are written in *continuous* anustubh-sloka, and there can be no doubt now, as we said before, that the *uniform* employment of this metre characterises a new period of literature subsequent to that in which the works composed in aphoristic style were produced.[1] There is thus a wide gulf between the aphorisms of Gautama, Baudhayana, Apastamba, and Vas'ishtha; and the metrical law-treatises of Manu, Yajnavalkya, and Narada, in which the *anustubh* metre is continuously and uniformly employed for the discussion of all theological, metaphysical, and legal questions. This natural division of two classes of legal works is very important in determining the *relative* ages of the ancient legal institutes.

Manu of the ancient legislators not to be identified with the author of the Institutes.

It would follow from this that Manu flourished in an age subsequent to that of Vas'ishtha. It is true that Gautama, Baudhayana, and Vas'ishtha mention Manu by name. But the maxims they quote are not to be found in our Code of Manu. Nay more.

[1] Max Müller's Ancient Sanscrit Literature, p. 68.

LECTURE IV.

Our Code of Manu enjoins precepts directly contrary to those quoted by Baudhayana. Vas'ishtha also quotes Manu as an authority on law. Two of these quotations are found in our Institutes; but one of the verses quoted occurs in a metre which is never employed in our Code.[1] These facts show that the Manu of the ancient legislators was not the same Manu whose Institutes have been handed down to us.

Tradition as to three redactions of Manu examined.

There is a tradition that Manu has undergone three successive redactions. The tradition does not seem to be entirely without foundation. In legal commentaries two other Manus are frequently quoted—a *Vriddha* (old) Manu, and a *Brihat* (greater) Manu. The verses quoted from these Manus are not to be met with in our Code. The fact is, there must have been a Manu, whose treatise on law was originally written in aphorisms, like those of Gautama, Baudhayana, Apastamba, and Vas'ishtha. A *Manava* school of law is mentioned among the schools of the Black Yajurveda. Their aphorisms on Vedic ritual and domestic sacraments still exist; but the aphorisms on law have been lost. These aphorisms must have been the foundation of the successive metrical redactions; and it is quite possible that the author of the original aphorisms was the first of lawgivers, and the fountain-head of Hindu Jurisprudence.

Antiquity

The present Code of Manu is, without doubt, the

[1] Vas'ishtha, XIX.

most ancient of all the metrical Smritis. A mere general survey of the Institutes of Manu, Yajnavalkya, and Narada would show that they must have promulgated their works in different ages, and that Manu was the oldest member of the triad, and Narada was the youngest. They depict different states of society, and enjoin rules of conduct suited to different circumstances. The growth of the social organization is distinctly marked, and development of legislation is clearly characterized.

LECTURE IV.

of Manu's Code.

If method, classification, and generalization be accepted as indubitable tests of scientific progress, Narada shows a greater degree of advancement than Yajnavalkya, and the latter than Manu. Manu's work is a collection of current laws and creeds, rather than a systematic digest. Theological and metaphysical speculations are all mixed up together with moral precepts and legal maxims. He enumerates eighteen titles of law, it is true, but he does not, in their treatment, strictly confine himself to the order he has himself prescribed. Directions as to diet are given side by side with the rules concerning Royal prerogatives; and "the law concerning games of chance"[1] are discussed with the rules of inheritance. The systematizing spirit, which is a characteristic feature of Hindu legislation, is only seen in its germs in Manu. Yajnavalkya, however, separates legal matters from theological and metaphysical

Narada's work a systematic treatise on law.

[1] IX, 220.

LECTURE IV.

theories, and treats of domestic and civil duties, of the administration of justice, and of the regulations as to purification and penance, in three separate books. The work of Narada is expressly a law-treatise, and the sage expends all his ingenuity and skill upon the systematic arrangement of all matters relating to the administration of law. Dogmatical theology and metaphysical paradoxes do not find a place in his ideal of a treatise on law. Any one who would compare the law of ordeals, the rules of judicial procedure, the regulations relating to gambling, and the maxims on the law of property, as they are treated in these Institutes, would at once perceive clear and distinctive traces of growth in the works of the sages mentioned above. The signs of advancement are unmistakable. The law of commerce is fully developed in Yajnavalkya and Narada, while Manu's law on this subject was yet in a crude state. The reason is apparent, and needs no exposition.

Weber on the posteriority of Yajnavalkya's Code to Manu's.

"With regard to the Code of Yajnavalkya," says Dr. Weber, "its posteriority to Manu follows plainly enough, not only from the methodical distribution of its contents, but also from the circumstance that it teaches the worship of Ganesa and the planets, the execution upon metal plates of deeds relating to grants of land, and the organization of monasteries, subjects which do not occur in Manu; while polemical references to the Buddhists, which in Manu are at least doubtful, are here unmistakable. In the

subjects, too, which are common to both, we note in Yajnavalkya an advance towards greater precision and stringency, and in individual instances, where the two present a substantial divergence, Yajnavalkya's standpoint is distinctly the later one." [1]

Chronological sequence of Manu, Yajnavalkya, and Narada.

"Buddhism is nowhere mentioned in Narada, but quite distinctly alluded to in Yajnavalkya; and if this important *argumentum a silentio*," says Professor Jolly, "has been deservedly used by some as a proof of antiquity in the case of Manu, it may be used with at least the same force in the case of Narada, so that it can at no rate be fixed at an earlier time than the rise of Buddhism." Hinduism must have re-established its lost influence, and Buddhism must have "begun to succumb to the victorious assaults of the Brahmins," when Narada gave his laws to the world.

From the considerations set forth above, we are of opinion that Manu, Yajnavalkya, and Narada must have followed each other in order in point of time.

Vishnu.

"Vishnu, not the Indian divinity, but an ancient philosopher who bore this name, is the reputed author of an excellent law-treatise in *verse*," thus said Colebrooke eighty years ago. The law-treatise he speaks of, is neither in verse nor in prose, but it is in both. Some portions of the work are written in verse, but the most important parts of it are generally composed in prose. This has led some scholars to believe that the work may be classed as a *Sutra* work, and that it

[1] Weber's History of Sanscrit Literature, p. 281.

LECTURE IV.

belongs to an age previous to that of Manu. It is written in prose, it is true, but the style is not the *aphoristic* style, which can be distinguished at a glance from ordinary prose. Aphorisms are short, pithy sentences, conveying a world of meaning within a short compass; they are the concentrated essences of distilled thoughts, and are as different from ordinary prose as solid rocks from loose molehills. There might have been a previous *Sutra* work of which the present Vishnu Smriti is but a redaction, but to call the treatise we possess by the name of Vishnu-*Sutra*, would be falsifying the name of *Sutra*, and depriving aphorisms of their most distinctive features.

Nature of aphorisms.

Vishnu-Smriti is not the metrical version of what are called the Vishnu-Sutras. Fallacy of the contrary proposition.

Visnhu-*Sutras*, we are told, are quoted in commentaries, and there must have been, therefore, it is argued, a treatise written by Vishnu in aphorisms, of which Vishnu-*Smriti* now extant is only a metrical version. We cannot by any means agree to the proposition thus laid down. It starts with the false premiss that *all* our Smritis were originally written in aphorisms, and that these aphoristic works were manuals of law used in different *Charanas* or Vedic schools. We do not think, in the first place, that *all* aphoristic treatises on law were employed as handbooks by these schools. There were some, no doubt, which were so used; but *most* of these, at any rate, had no connection, as we showed before, with the Vedic schools. They were independent treatises on law, whose authority was binding upon the whole community. Manu may be a

metrical redaction of an original Sutra work, used by the Manavas of the Black Yaju school; but there is no evidence to show that Yajnavalkya's Code partook of the same character. For all that we know to the contrary, Yajnavalkya's law-treatise was originally written in verse, and had not the remotest connection with any aphoristic work or any Vedic school. The same remark may be made with regard to Vishnu. It is an *original* work, independent of any aphoristic treatise on law. As to the quotations which are said to be Vishnu-*Sutras*, we strongly suspect that when they are properly analyzed, they will be seen to be plain prose, perhaps in borrowed feathers. We are not disposed on these considerations to ascribe to Vishnu's Code an age which cannot possibly belong to it. It is utterly impossible for him to claim brotherhood with Gautama or Vas'ishtha; he must be given his proper position as a follower of Manu and Yajnavalkya.

Vishnu's age subsequent to that of Manu and Yajnavalkya.

Vishnu describes a state of society much akin to that of the present age. Manu, Yajnavalkya, and Narada never dreamt of the minute subdivisions of castes which distract the present Hindu society. Some of these are defined with great precision by Vishnu. It would seem as if he were a resident of some populous village in Bengal or Oudh, who was bent upon collecting all available information concerning Hindu castes and tribes of the present day. We meet all these castes and tribes in his book from the sweeper to the barber, from the carpenter to the

His description of social condition.

LECTURE IV.

Brahmin. The semblance of the four original castes is kept up, but the mixed castes enumerated there are so many, and so varied in their occupations, that one cannot but be led to the belief that Vishnu is laying down law for a state of society which has very few points in common with that with which Manu and Yajnavalkya are concerned.

"*Jangala.*"

There is a word used in the treatise to which I would draw your attention. The word I mean is *jangala*. I know that a Sanskrit derivation is given to it. It is, however, a foreign word, and does not seem to be indigenous to the soil of India. Would not the employment of such a word be a presumptive proof that, at the time of Vishnu, Hindu society had abandoned its primitive divisions, and was composed of mixed castes, who followed the thousand and one hereditary occupations of a more civilized state of society; and that, without confining themselves to populous cities and towns, Hindus of that day cultivated desert tracts, and fixed their abodes in *jungles?* The laws laid down by Vishnu speak of improvement and civilizing influences in different social relations; and we should be justified, therefore, in assigning him a place posterior to that of Manu, Yajnavalkya, and Narada.

Vishnu's laws point to an advanced state of society.

Four later lawgivers.

Of the next four teachers, the order of precedence seems to be as follows:

1. Devala.
2. Vrihaspati.
3. Katyayana.
4. Vyasa.

Their entire works are lost. We possess only metrical fragments. These fragments, we believe, are extracts from larger works, which were originally written in verse, and were not founded upon any *Sutra* treatises on law.

LECTURE IV.

Devala appears to be the oldest of the group. The language used by him has more archaic forms than that of any of the other three. The verses are of the same jagged and artificial character as in Manu and Yajnavalkya. And if we look to internal evidence, we find that the opinions expressed by Vrihaspati and Katyayana spring from a more advanced standpoint than those of Devala. Devala still clings to the old classifications of sons in twelve divisions, though a faint trace of change of opinion is perceptible.[1] Vrihaspati wavers in his opinion, rejects altogether five classes of sons, and thinks that four other classes are held "in a *middle* degree of estimation." Further on, he is evidently dissatisfied with himself for still holding ideas which were old-fashioned, and not suited to the social conditions of his day. He forgets himself for a time, and after premising the Kali age, he boldly puts forth the following dictum: "Sons of many different sorts, who were made by ancient sages, cannot now be adopted by modern men."[2] There is a tradition also that Vrihaspati was a son of Devala, and if the tradition

Devala first in the order of succession.

Vrihaspati second.

[1] Dayabhaga, X, 7.
[2] Colebrooke's Digest, II, 406.

LECTURE IV.

does not err, it gives a coloring to the supposition that Vrihaspati followed Devala in point of time.

Katyayana

Katyayana repeatedly quotes Vrihaspati as an authority on law.[1] In the absence of any other testimony, this may justify us in placing this legislator immediately after Vrihaspati. We can see no connection between this Katyayana and his great namesake, the celebrated author of the *Sutras* attached to the White Yajur Veda, and the great critic of Panini. Max Müller places the theologist and the grammarian in the second-half of the fourth century (B. C.); Goldstücker in the first-half of the second century (B. C.); and Weber about twenty-five years later. The learned discussions on this subject of eminent Sanskrit philologists are of no avail to us. They give no clue to the identification of Katyayna the theologist, with Katyayana the lawgiver. If the theory, that all the metrical lawbooks we possess are founded upon *Sutra* treatises, which were originally used as manuals of law in different schools, be correct, the two names might be inseparably connected with each other. It would then follow that some remote disciple of the great teacher versified his Sutras, and the present law-treatise is a secondary redaction of the original Code. If this unknown disciple, who assumed the name of Katyayana, really undertook this task of versification, he must have taken unwarrantable liberties with his great master,

[1] Dayabhaga, VI, 2. 1, 27; Colebrooke's Digest, II, 148.

and must have made many interpolations, which were not found in the original. The social conditions mirrored forth in the metrical treatise could not have existed in India at such an early date as two thousand two hundred years before the present generation. We notice many facts in the metrical quotations which could be assimilated with the social phenomena witnessed in our time. There are comparatively fewer archaic social forms in Katyayana's treatise than in other codes of law. The strict rules of induction, then, would prohibit us from making the inference (from the mere fact of similarity of names) that the two Katyayanas were identical. LECTURE IV.

It is with great hesitation that we place Vyasa immediately after Katyayana. Our only ground for doing so is *internal evidence*, which seldom, in these cases, leads to wrong conclusions. But the difficulty of finding the exact position which Vyasa the lawgiver should occupy in the table of precedence is almost insurmountable. The name belongs to an immortal theologian, the arranger of the Vedas, the founder of the Vedanta philosophy, the author of the Puranas, and the compiler of the Mahabharata. All that is imperishable in Sanskrit literature, all that commands love and respect, and all that treats of the most solemn subjects having deep human interest, is comprehended under the name of Vyasa. Legends are told of his superhuman powers which could not be vouchsafed to an ordinary mortal. To him we pay Vyasa

LECTURE IV.

our obeisance from a distance, and do not venture to associate his name with that of the humbler individual, who could not, without presumption, claim the exalted position held by the divine associate of the gods.

Not identical with the famous author of the Mahabharata.

Vyasa, the author of our code of laws, was a distinct person, and however great his merits, must not be identified with the august personage whose immortal name figures in every era and in every page of Sanskrit literature. The name is a mere coincidence, and nothing more.

He delivered his laws at Benares.

The holy city of *Benares* was the place where, we are told, Vyasa delivered his laws to an audience of learned men who were solicitous to learn from him the nature of the duties and relations of the different sections of society towards each other. He is nearer our time, and we can almost fancy him seated on the marble steps of *Manikarnika*, the sacred resort of pious men from all parts of the country. Surrounding him is a large group of devout persons, while he expatiates upon the rules of conduct which *all* must obey if they expect freedom from cares in this, and eternal beatitude in the life to come. "He who regulates his conduct according to the laws approved by Vyasa, shall never *fall*," so said Vyasa at the end of his lectures, and thousands, who, inspired with awe and respect, had listened to him with rapt attention, now dispersed to their different homes, openly acknowledging the gravity of the theme, and the imperative necessity of following the rules laid down by this great lawyer and theologian.

Lecture IV.

Summary.

Our table of precedence then would stand thus :

Sutra Works.

Gautama.	Harita.
Baudhayana.	Yama.
Apastamba.	Sankha.
Vas'ishtha.	Parasara.

Metrical Works.

Manu.	Devala.
Yajnavalkya.	Vrihaspati.
Narada.	Katyayna.
Vishnu.	Vyasa.

This closes our inquiry into the relative ages of the ancient legislators. We will in our future Lectures attempt to trace the course of development of the principles of inheritance during the middle ages, as well as in the modern schools of Hindu law.

LECTURE V.

PRINCIPLES OF SUCCESSION IN THE MIDDLE AGES.



Knowledge of early forms of juridical ideas—Its importance—Determination of primitive social institutions of the Hindus not impracticable—Progressive character of Hindu society—Stability of law—Social condition of the Hindus in the Vedic times was not of a primitive character—Reference to the rich and poor in the hymns—Laws of property—Inheritance and contract—Difficulty of exactly determining the state of law in the Vedic period—Due to absence of continuous treatises on law—A formal Code of rules for social conduct unnecessary in the patriarchal age—Constitution of Hindu society in that age—*Grihapati*, ' or pater familias '—His authority supreme in the family—Elasticity of family law—Political aspect of the family—Necessity for increasing its members—Slaves—Adoption—Fictitious son—Sacredness of matrimonial connection—Sons of women marrying a second time—Rights of different classes of sons as recognized by the Vedas not the same—Why was a son longed for in the primitive age—Religious aspect of the question in later times—Narada on the benefits of a son—Immortality—Enjoyment of life—Salvation through son a later idea—Benefits desirable from a son, grandson, and great grandson enumerated—*Putra*—A sonless man is doomed to eternal torments—On account of his failure to pay the debt due to his ancestors—Twelve kinds of sons substituted for son of the body—Hints as to devolution of property taken from the Veda—Primogeniture—Twelve-day sacrifice right of the first-born—Vishwamitra's adoption of Sunahsepha as the eldest of his sons—Division of property in equal shares—Development of the law coeval with the emancipation of the individual from the family thraldom—Hostile doctrine in the Taittiriya-Sanhita and the Brahmana—Possibility of their co-existence—Manu the first exponent of the doctrine of individual rights—Changes in the law of division of property—Gautama—Baudhayana—Apastamba—Vas'ishtha—Manu—Narada—Vishnu—Vrihaspati — Katyayana — Struggle between the rival doctrine of primogeniture and equal distribution of property at last ended in the ascendency of the latter—Polygamy; its effect on the law of division—Exclusive right of the eldest son to inherit the paternal property not favored by legislators since the time of Gautama—His right to an additional share or to some special present recognized in certain

families by custom—But denied by Apastamba and Yajnavalkya—Power to dispose of property by will—Testamentary power not co-extensive with that of making partition or disposition *inter vivos*—Principle of graduating social position of different kinds of sons—Blood relations preferred to strangers—Sons classified into 'heirs' and 'kinsmen'—Each including six different kinds—Enumeration of various classes of sons by Harita—Vasishtha—The two enumerations are not wholly in accord as regards order—'Putrika-putra,' or appointed daughter's son, explained—By Hemadri—In the Rig-Veda—Gautama places him in the category of kinsmen—Baudhayana assigns his place next to the son born in wedlock—Harita and others rank him as kinsman and heir capable of inheriting in default of superior claimant—Appointed daughter's son and wife's illegitimate son both discarded by Vrihaspati—Legitimacy the principle of classification with Gautama, Baudhayana, and Manu—Blood relationship with Harita and others—Sons other than those born in wedlock are now extinct, except the son given and the son made—Son given—The practice of adoption a very ancient one—How it originated—Adopted son how treated at first—Rules as to the class of persons from which adoption is allowable—Adopted son's position in the list of sons—Tabular view of the position of different kinds of sons according to different legislators.

Knowledge of early forms of juridical ideas.

"If by any means," says Sir Henry Maine, "we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself."[1] An earnest research, therefore, into the primitive history of society and law is sure to be productive of the very best results. "It is almost impossible to grasp clearly," we quote the words of Justice Markby, "many of the conceptions with which the lawyer has to deal without having traced their history. Many of the terms in which they are expressed are very ancient. The conceptions themselves are neither new nor old.

[1] Maine's Ancient Law, p. 3.

LECTURE V.

They came long ago into existence, but have been brought under the influence of a long succession of antagonistic philosophies and conflicting creeds. By these they have been, very often at the time imperceptibly, but upon the whole greatly, modified. So that whilst the name has remained the same, the ideas comprised under it have greatly varied." Any researches, therefore, "in which the connection is traced between modern legal ideas and the rudimentary institutions of early social life, have a great value in assisting the student of law to grasp these ideas, quite apart from their value to the philosopher and historian."[1]

Its importance.

The phenomena which we witness in early societies, however, are not easy at first to understand, but the difficulty of grappling with them bears no proportion to the perplexities which beset us in considering the baffling entanglements of modern social organizations. Granting that they gave more trouble than they do, no pains would be wasted in ascertaining the germs out of which has assuredly been unfolded every form of moral restraint which controls our actions and shapes our conduct at the present moment.[2]

Determination of primitive social institutions of the Hindus not impracticable.

These words need no comment from us. The historical method of enquiry, recommended by one of the greatest of modern jurists, will enable us to find out the true nature of those complex institu-

[1] Markby's Elements of Law, p. 40. [2] Maine's Ancient Law, p. 120.

tions of modern Hindu society, which at first sight seem to be inexplicable. These institutions did not exist in their present shape when they were first formed. We see them in their rudimentary state during the Vedic period, and then gradually assuming consistency and stability in the long succession of ages which followed that period. The germs are all there; and if we wish to examine critically the social phenomena of the present day, we must penetrate as far up as we can into the history of primitive Indian society.

Progressive character of Hindu society.

We are the very last persons to admit that Hindu law is not progressive. What was true three thousand years ago is not true at the present time. The principles of legislation sanctioned by Gautama are different from those accepted by the founders of the present schools of Hindu law. Law, certainly, is ever changing with the change of social necessities and social opinion. But the foundations of society remain unchanged; and law, therefore, however much it may be influenced by surrounding circumstances, cannot *entirely* change its original nature. The importance of the stability of human nature cannot be overrated; and no true explanation can be given of our existing laws if we pay no regard "to the inherited qualities of the race, those qualities which each generation receives from its predecessors, and transmits but slightly altered to the generation which follows it." It would be wrong to suppose

Stability of law.

LECTURE V.

that laws are creatures of climate, local situation, or accident alone. These are only its *modifying* causes, and nothing more. These should certainly be allowed due weight in accounting for the growth and formation of law, but should never be accepted as the *only* causes in which law has its origin. "The truth is, that the stable part of our mental, moral, and physical constitution is the largest part of it, and the resistance it opposes to change" is markedly stubborn in all variations of human society. Law changes, it is true, but the new product is a chip of the old block, and its original character is easily perceptible in all its vicissitudes. The law of inheritance has been greatly modified, we admit, as it passed through various social phases in different ages in the history of the nation; but the impulse which was first given to it is still influencing the course of its action. This much is certain at least, therefore, that our inquiries into the primitive state of the law of inheritance cannot be entirely fruitless. They will enable us to understand clearly many of the conceptions which underlie the law of succession, if they do nothing more. The task is worth attempting, and the present lecture will be devoted to an exposition of the law of inheritance in its various stages of progress during what may be called the ancient and the medieval ages of the legal history of India.

Social con-

We must remark at the outset that it would be

erroneous to believe that the condition of society during the Vedic period was of a very primitive description.[1] All the facts which have been brought together by modern research render it undisputable that the Hindus of the Vedic era had attained to an advanced state of civilization.[2] All the requirements of a civilized life are mentioned in the hymns. The arts and sciences of civilized society were cultivated; trade and agriculture were practised; religion and morality had made considerable progress. Large and populous cities are repeatedly described, and various intimations are given that wars were carried on in a large scale. The ocean and its phenomena were familiar to the Vedic Aryans, and expeditions by land must have been frequently undertaken. All the virtues and vices of civilization were present in the Vedic society, and there was also a certain sort of refinement inseparable from an advanced state of the social organism.

—dition of the Hindus in the Vedic times was not of a primitive character,

Domestic relations in all their various phases were fully developed, and morals are inculcated which would do credit to any civilized nation of the nineteenth century. Untruth is condemned in the strongest language, and the virtues of friendship are extolled with all the earnestness of sincerity.

We find in the hymns a distinct reference to the rich and the poor as existing in the community.

Reference to the rich and poor in the hymns.

[1] Muir's Sanskrit Texts, Vol. V, p. 473. [2] Wilson's Rig-Veda, Pref.

Lecture V.

The existence of both classes is distinctly recognized, and liberality on the part of the wealthy is recommended. The house of the donor of largesses is compared to a lotus pond, and is said to be embellished like a palace of the gods.[1] The man who is a friend of Indra is said to have horses, chariots, cows ; "to be handsome, to enjoy vigorous vitality, and to come resplendent into the assembly."

Laws of property.

When the social relations were so complex and so varied, it would be absurd to suppose that the laws of property were extremely simple in their character. There can be no doubt that social necessities and social opinion are always in advance of law, but still the gulf between them can never be very wide. The happiness of a people can never be secured, so long as laws are not *adapted* to the existing social conditions ; and the greater or less happiness of a people depends on the degree of promptitude with which the gulf between law and social necessities is narrowed.[2]

Inheritance and contract.

There are some curious passages, says Dr. Wilson, in the Vedic hymns relating to the laws of inheritance and of simple contract. They may not be precise or altogether intelligible, yet they are sufficiently so to show that legislative enactments were in existence, and that, with respect to these two subjects, the law was essentially the same as that

[1] R., X, 107, 10.

[2] Maine's Ancient Law, p. 24.

which is laid down in the reputed writings of ancient legislators, and to a certain extent is still in force.[1]

Difficulty of exactly determining the state of law in the Vedic period.

We demur to this. If crude legislative enactments were in existence, we have no means of knowing what these were. There are no continuous treatises on law, as we said before, in the Vedic writings. Legal maxims are only incidentally noticed by way of comparison or illustration. These notices are so brief and so obscure, that it is difficult to make out from them the real state of law during the Vedic period. But brief and obscure as they are, they afford us a glimpse of the social condition of India at that remote age, and we can distinctly perceive the germs out of which Hindu law has been developed.

Due to absence of continuous treatises on law.

Sayana, in his commentary on the Parasara Code, says:—"As to finding the authority for these laws in direct precepts of the Sruti (revelation), this is out of the question, because such precepts are not to be found there." Haradatta, the learned commentator of Apastamba, puts forth a theory of his own, and remarks: "Although we have not before our eyes a Veda, which is the source of these laws, we must still conclude that Manu and the rest had." Even so old a writer as Apastamba believed "that certain rules must be considered as given in Brahmanas of which the tradition or reading has

[1] Wilson's Pref., Vol. III, Rig-Veda.

LECTURE V.

been destroyed. Their former existence must be inferred from the simple fact, that these rules are still followed by men."

A formal Code of rules for social conduct unnecessary in the patriarchal age.

The absence of continuous legal treatises, we thus see, was deplored in all ages. The exact connection between the Veda and the professed legal works could not be traced, and recourse was had to the theory that there were Vedic works in which legal maxims were explained and illustrated, but that these works have now been lost. Can these connecting links be ever recovered? Vain hope. They never existed, and cannot, therefore, ever come to light. There are no continuous treatises on law in the Vedic works, because there was no necessity for them during the Vedic period. The constitution of society was such that it was not necessary to embody the laws of property in a formal code. If they existed at all, they existed in the archives of the patriarchal families, and these archives were nothing more than family traditions engraved on the tablets of their memories.

Constitution of Hindu society in that age.

We will explain what we mean.

Hindu society during the Vedic period was an aggregation of patriarchal families. Each family was complete in itself, and its government was vested in the eldest living ascendant. He was called *grihapati*, or master of the household.[1] He was the patriarch of the family, and his autho-

Grihapati, or 'pater familias.'

[1] Haug's Aitareya Brahmana, p. 363.

rity was absolute. He was the ruler, the legislator, the judge, the counsellor, and the spiritual guide of the family. All the individual members blindly followed his behests. His commands constituted the laws of the family. He exercised supreme authority over the person and the property of all who were immediately under his control. His dominion extended to life and death, and was as unqualified over the members of the family as over his slaves. For all practical purposes he was the absolute master of the family property, and the rules he laid down for the management of the family estate could on no account be interfered with. Law was the master's word, and there was no appeal against it.

His authority supreme in the family.

The traditions of the family must have formed the basis of the family law. But the law which was administered at any specified time could not have been entirely dependent upon these traditions. Law varied with the particular circumstances at a given time, and the despotic ruler of the family could bend it to his will. Law lacked that uniformity and invariability which are its chief characteristics. The idea of *immutability* was entirely foreign to the ancient conception of law. It was like the leaflet of a tree, which every passing breeze could play with. It was not like the living rocks of bygone ages, which admitted of growth, but whose foundations could be shaken by no sub-

Elasticity of family law.

LECTURE V.

terranean convulsion. The law of person and of property was yet in its infancy, and its basis was not firmly established. It was subservient to the interests of the corporate family, and if it in the least interfered with the welfare of the family group, it was ruthlessly trampled under foot, and a new law better suited to the circumstances of the family was adopted without the slightest hesitation. The law of property, therefore, in our sense of the word, was utterly unknown, and it would be vain to search for a code of laws which prevailed during the Vedic period of Indian history.

Political aspect of the family.

The family was the unit of society, and its independent and corporate existence was an object of the highest ambition with the patriarch of each family. Each family was like an independent State, and its relations with other families were conducted on the principles of international law. All persons and all property lying outside the family limits were considered as belonging to a foreign government, and every dispute concerning such persons and property was decided by an appeal to the principles of international law. To increase the power of the family, and to make it unassailable by foreign enemies, was the principal aim of the patriarch. Numerical strength was the first necessary condition by which power could be secured; and all the efforts of the patriarch were directed towards making the family

Necessity

numerically strong. Where the offspring born of

lawful wedlock were numerous and able-bodied, numerical strength was secured, and there was no necessity for resorting to other expedients to gain the desired end. But where such was not the case, the introduction into the family of foreign elements was a *sine qua non* of the independent existence of the family in its full power. Slaves could be bought in abundance, but they could never supply the place of blood relations. They could never be made to feel that interest in the promotion of family welfare as members of the family knitted together by ties of blood. Where the natural ties were wanting, artificial relations were created, which simulated in every respect the bonds of consanguinity. Strangers were adopted into the family group, and "the expedient which in those times commanded favor was that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted."

LECTURE V.

for increasing its members.

Slaves.

This was the origin of adoption — which was nothing more or less than a fictitious creation of blood relationship. The family was constantly enlarged by the absorption of strangers within its circle, and the fiction of adoption so closely simulated the reality of kinship, that neither law nor public opinion made the slightest difference between a real and an adoptive connection. The persons who were thus theoretically amalgamated with the family by

Adoption.

LECTURE V.

their common descent were practically held together by their common obedience to their highest living ascendant—the father, grandfather, or the great grandfather.[1]

Fictitious son.

Various expedients were resorted to for this artificial creation of blood relationship. The strangers introduced into the family were called *sons*, and enjoyed in some measure the privileges of sons born in lawful wedlock. If the strangers thus adopted had the least agnatic blood in them, they were unhesitatingly brought into the family circle. If no blood relationship could be traced, the exigencies of the family permitted the absorption into the family of utter strangers, who, though they had not the remotest connection by blood, were treated as kinsmen entitled to filial rights.

Sacredness of matrimonial connection.

The tie of matrimony was held sacred during the Vedic period. The sons born of lawful wedlock, therefore, held the first rank. With him might be associated the son of an *appointed* daughter, who, in the absence of a legitimate son, was treated in all respects as such, and was entitled to all the privileges of a son born in lawful wedlock.[2]

The son of a widow also by her husband's brother received the name of a son, and was considered as a member of the family.[3]

Sons of women

Women appear to have been permitted to marry

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[1] Maine's Ancient Law, p. 133.

[2] Rig-Veda, I, 31.

[3] Rig-Veda, X, 40.

a second time.[1] Their sons, therefore, must have had social recognition. We have numerous allusions in the Vedic writings to sons given by the parents, to sons bought, and sons self-given.[2]

marrying a second time.

Rights of different classes of sons as recognized by the Vedas not the same.

We thus find that the Vedas recognized seven classes of sons. It must be remarked at the outset, that all these sons did not acquire the same rights and privileges as legitimate sons of the body. A distinction was made, and this distinction was strictly maintained. In default of a son born in lawful wedlock, the son of an appointed daughter was entitled to the rank, station, and rights of the legitimate son. But we do not find that the *adopted* son was so entirely affiliated to the family as to acquire *all* the rights of a genuine member of the family. There can be no doubt, however, that during the Vedic period strangers were freely amalgamated with the family, and that their social position was recognized by the Vedic sages. Their exact position in the social scale was not determined, simply because in a corporate family *all* the members formed the inseparable parts of a compact body, and their separate existence was not recognized by society. They were *maintained*, and they were all engaged in the service of the family. There must have been a distinction, but it could not have been so marked as to be galling to any *adopted*

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[1] Atharva Veda, IX. 5. 27, Taittiriya Aranyaka Pref.

[2] Taittiriya. San. 3, 5, 2. Aitariya Brahmana. Story of Sunahsepha

LECTURE V.

member of the family. No scientific classification of the different kinds of sons could have been made till the disintegration of the individual from the family group was complete. The inspired sages of the Vedic period did not attempt any legal classification of sons, simply because there was no necessity for such an elaboration in the state of society in which they lived. When the individual members of the family partly extricated themselves from the trammels of the corporate association, the want of such a classification was keenly felt, and the medieval legislators of India determined the exact position which each class of *sons* should occupy in the social hierarchy.

Why was a son longed for in the primitive age.

The natural craving to have a son, in whom our affections could be centered, and who would bear our name and perpetuate our memory, was carried to its utmost length by the Aryan settlers of Hindustan. It is instructive to observe the feelings with which a son was regarded both in ancient and in medieval India. In the hymns of the Rig-Veda a son was the delight of his father, and his birth was earnestly desired to continue the line of his progenitors. The religious element had not yet entered into the conception of a son. The family would be destroyed, and the mundane existence of a long continued line of ancestors would be obliterated, if no son were born in the family. Religion, in the Vedic age, concerned itself with higher things, and not with

the birth and death of a male representative of the family. The theory of a region of eternal torments which a *sonless* man would inhabit, was not yet invented. But there is ample evidence to show that the primitive sages of India most solemnly enjoined upon all their faithful followers the duty of begetting a son, and thus maintaining the power and the honor of the family in which they were born.

LECTURE V.

Religious aspect of the question in later times.

In the later stages of the social progress, the birth of a son was felt as an *absolute* necessity—not only in this world, but also in the life to come. Religion had sanctified the natural craving, and the unfortunate man who was not blessed with a son in this world was doomed to a dark and fathomless abyss of eternal horrors. "Since a son," says Manu, "delivers his father from the hell called *put;* therefore he is named *putra* by the self-existent himself."[1] The language of Harita is stronger than that of Manu: "A certain hell," says this sage hoary with the wisdom of ages, "is named *put;* and he who is destitute of offspring is tormented in hell. A son is, therefore, called *putra*, because he delivers his father from that region of horror."[2] Though the full extent of this medieval conception was not realized in the Vedic period, we find sufficient indications in the Brahmanas to justify us in supposing that the *pious* Hindu, who would devoutly follow the tenets of the revealed religion, was bound

[1] Manu, IX. 138. [2] Dayabhaga, XI, 1, 31.

LECTURE V.

in duty to have a son who was his "light in the highest world." We will quote from the Aitareya Brahmana:

Narada on the benefits of a son.

"Harischundra, the son of Vedhas, of the family of the Ikshwaku, was a king without a son. He had a hundred wives, but had no son by them. In his house lived Parvata and Narada. He asked Narada: 'Tell me, O Narada! what do people gain by a son, whom they all wish for, as well those who reason as those who do not reason?'"

Narada replied:

Immortality.

"If the father sees the face of a son born alive, he pays a debt in him, and goes to immortality. The pleasure which a father has in his son is greater than all the pleasures that can be obtained from the earth, from the fire, and from the waters. Always have the fathers overcome the great darkness by son; for a self is born from himself; it (the new-born self, the son) is like a ship, full of food, to carry him over.

"What is flesh? What is the skin? What are the hairs? What is heat? Try to get a son, you Brahmans; he is undoubtedly the world.

Enjoyment of life.

"There is no life for him who has no son; this the animals also know. The path which those follow who have sons and no sorrows, is greatly praised. Beasts and birds know it, and they have young ones everywhere."

Salvation

It is clear from the passage quoted above that the

birth of a son was earnestly longed for. But we find no hint in it that the son was a means of salvation in the other world. This was a later idea, and Manu gives full expression to it:

LECTURE V.

Salvation through son a later idea.

"By a son a man obtains victory over all people; by a son's son he enjoys immortality; and afterwards, by the son of that grandson, he reaches the solar abode." "Since the son delivers his father from the hell named *put*, he was, therefore, called *putra* by Brahma himself."[1]

Benefits desirable from a son, grandson, and great grandson enumerated.

Putra.

The passage is short but significant. A son must be begotten, or the man would be doomed to eternal misery in the other world. His purity and irreproachable conduct in this life would avail him nothing. The debt which he owes to society and to his progenitors, could not be repaid except by begetting a son. "It is mentioned in the *Mahabharata*, that the ingress of the sage Mandapala into a region of purity was prevented by the want of male issue; for the same poem shows that the debt to his progenitors undischarged is the ground on which a man is excluded from the blissful region, even though his conduct has been virtuous."[2] The debt to progenitors is discharged then only when a son is begotten. A social curse hangs upon the man who would not try every means in his power to pay off the *debt* he incurs from the moment of his birth. Solemn sacrifices were performed,

A sonless man is doomed to eternal torments

On account of his failure to pay the debt due to his ancestors.

[1] Manu, IX, 137, 138. [2] Colebrooke's Digest, II, p. 201.

when all other means failed. If neither sacrifices nor virtuous acts were sufficient to give a son, recourse must be had to adoption, and the adopted son must perform all the family rites which a natural son, if born, would have performed.

Twelve kinds of sons substituted for son of the body.

A son, we thus find, was the means of the father's salvation in the other world. It is no wonder, therefore, that a Hindu would sacrifice everything in this world in order to have a son. In default of a son of the body, twelve other kinds of substitutes were recognized; so that "the cake, the water, and the sacrifice" might be continued from generation to generation.

It is not improbable that we have here the key to the prevalent belief in the need of offspring. The preservation of society would be the paramount need in an early epoch, hence we may conceive the duty of maintaining the family as receiving the sanction of religion in order to act as an incentive to its performance.

Apart from religious considerations, the existence of a son was a social necessity for perpetuating the line, for guarding the family property, and for maintaining the honor and prestige of the united group.

To return from this digression.

Hints as to devolution of property taken from the Veda.

Let us now examine the hints, which are given in the Veda, as to the devolution of property after the death of the owner.

Primogeniture.

So long as the corporate existence of the family is strictly maintained, there is no room for any other mode of succession than that by primogeniture. The eldest living ascendant succeeds to the family estate, and manages its affairs, to the exclusion of all the other members of the family. He is their leader, lord, and master, and they must live in absolute subjection to him. It is only when the family group is in the first stages of disintegration, that the practice of *equal* division of property among the male children after the death of the last owner is usually followed. Individuality then gains the upper hand, and communism loses its former power and prestige.

The rights of the first-born were fully acknowledged during the Vedic period. His claims as a leader could not be disputed, and his succession to the heritage was universally admitted. We quote from the Aitareya Brahmana in support of our position: [1]

Twelve-day sacrifice right of the first-born.

"The twelve-day sacrifice is for the first-born. He who first performed it, became the first-born among the gods. It is the sacrifice for a leader. He who first performed it became the leader among the gods. The first-born, the leader of his family, ought to perform it alone, then happiness lasts all the year where it is performed.

"The gods once upon a time did not acknowledge

[1] IV, 25.

that Indra had the right of primogeniture and leadership. He said to Vrihaspati 'perform for me the twelve-day sacrifice.' He complied with his wish. Thereupon the gods acknowledged Indra's right of primogeniture and leadership.

"He who has such a knowledge is acknowledged as the first-born and leader. All his relations agree as to his right to the leadership."[1]

We will take our next quotation from another portion of the same work:[2]

Vishwamitra's adoption of Sunahsepha as the eldest of his sons.

Vishwamitra wished to adopt Sunahsepha as his son. He said to him,—"Enter my family as my son." Sunahsepha replied, "O prince, let us know, tell us how I, a descendant of Angira's, can enter thy family as thy adopted son." Vishwamitra answered, "Thou shalt be the *first-born* of my sons, and thy children the best. Thou shalt now enter on the possession of my divine heritage. I solemnly instal thee to it." Sunahsepha then said, "When thy sons all agree to thy wish that I should enter thy family, O thou best of the Bharatas, then tell them, for the sake of my own happiness, to receive me friendly." Vishwamitra then addressed his sons as follows: "Hear ye now, all ye brothers, do not think yourselves entitled to the right of primogeniture, which is his (Sunahsepha's)."

"The Rishi Vishwamitra had a hundred sons, fifty of them were older than Madhuchandas, and fifty

[1] IV, 25. [2] VII, 17, 18.

were younger than he. The older ones were not pleased (with the installation of Sunahsepha to the primogeniture).

"Vishwamitra then pronounced against them the curse, "You shall have the lowest castes for your descendants." But Madhuchandas with the fifty younger sons said, "What our father approves of, by that we abide; we shall accord to thee (Sunahsepha) the first rank, and we will come after thee!" Vishwamitra, delighted (with this answer), then praised these sons with the following verses:

"You my sons will have abundance of cattle and children, for you have made me rich in children in consenting to my wish.

"Ye sons of Gadhi blessed with children, you all will be successful when headed by Devarata (Sunahsepha); he will always lead you on the path of truth.

"This Devarata is your master; follow him, ye Kusikas! He will exercise the paternal rights over you as his heritage from me, and take possession of the sacred knowledge that we have.

"Devarata is called the Rishi who entered on two heritages, the royal dignity of Jahnu's house, and the divine knowledge of Gadhi's stem."

It is clear from the passages quoted above that the first-born was the leader of his family, and was entitled to the family property as his birth-right; or, in other words, primogeniture was the settled law of succession in ancient India.

LECTURE V.

Division of property in equal shares.

Side by side with the rule of primogeniture another institution was growing up, which ultimately superseded this mode of succession altogether. We refer to the law of equal distribution of property among all the sons of the deceased owner. It made its appearance during the later stages of social development in the Vedic age. Primogeniture represented the claims of communism, and the principle of equal distribution represented those of individuality. The struggle between the two principles was long and arduous, and it has been continued to the present day. The principle of equal distrbiution triumphed at last, but the victory was not easily gained. There is no trace of the struggle in the Rig-Veda, because the doctrine of individual rights had not yet come into existence. We find the first mention of the law of equal distribution in the Taittiriya Brahmana, which is posterior in date to the hymns of the Rig-Veda. It would be a great mistake to suppose that individuality at once became a power the moment the roots of communism were loosened. They existed as hostile principles in the same community for a long time together. We cannot suppose that the individual awoke from his sleep one fine morning and found himself emancipated from the thraldom of the family. Those who watch the progress of *new* ideas, can easily conceive what a long time must have elapsed before the individual

Development of the law coeval with the emancipation of the individual from the family thraldom.

gained his rights. The conservative party—the representatives of the old *regime*—must have strenuously exerted their influence to support the claims of the corporate family, and maintain the rule of primogeniture, as the only legitimate mode of succession. The disintegration of the individual from the family, however, must have necessitated the other mode of succession, and the strife between the advocates of primogeniture and the founders of the new doctrine of equal distribution must have long divided Hindu society into hostile parties. We accordingly find both the principles enunciated in the Veda—one in the Taittiriya Sanhita, better known as the Black Yajur Veda, and the other in the Tattiriya Brahmana. These were works of two successive ages of Vedic literature.

Hostile doctrine in the Taittiriya Santirhita and the Brambana.

We will give the exact words of the inspired writer of the Taittiriya Sanhita :

"They distinguish the eldest son by the heritage."

Again we find in the Brahmana:

"Manu divided his wealth among his sons."

Possibility of their co-existence.

These are two hostile principles, but we have shown above that it was not unnatural for both principles to exist at the same time in the same community together. Where the family feeling was strong, the rule of primogeniture was honored, and the first-born inherited the family property, and became the leader, the master, and the ruler of his

LECTURE V.

brethren. Where the family ties had slackened, and the doctrine of individual rights had attained strength and supremacy, the law of equal distribution prevailed to the total exclusion of the rule of primogeniture. Thus among two hostile sections of the Hindu society both the principles governed the law of succession.

Manu the first exponent of the doctrine of individual rights.

Manu then was the first representative of the new social reformers, who applied in practice the principle of individual rights. The Aitareya Brahmana refers to the circumstance, and we extract the passage in which allusion is made to it in elucidation of the subject:

"Nabhanedishta was a son of Manu, who was given to the sacred study (after investiture in the house of his guru); his brothers deprived him of his share in the paternal property. He went to them and said, 'What portion is left to me?' They answered, 'Go to the adjudicator and arbitrator.' By 'adjudicator and arbitrator' they meant their father. He went to his father and said, 'They have divided the property, including my share, among themselves.' The father answered, 'My dear son, do not mind that.' Manu then communicated to him certain scientific secrets, by which his son gained a *thousand* (pieces of gold!)"

Changes in the law of division of property.

The law of division of property after death underwent many important changes before the heritage was *equally* divided among the male issue of the deceased

owner. The eldest son had at first the exclusive right to the paternal inheritance. When the rule of primogeniture was disturbed, *equal* division of property did not take its place at once, but a long time elapsed before the principle was fully acknowledged. Many concessions were made at first, in order to restore peace and harmony to Hindu society. The compromise suggested at first was, that the proportions of the respective shares should be regulated by the seniority of the sons of the deceased owner; or, in other words, that the paternal estate should be divided into a certain number of shares; that of these the eldest should receive the largest number, the second son a few shares less, and so on, the shares decreasing according as the sons were more or less remote from the first-born. We will not, however, anticipate, but allow the ancient legislators to speak for themselves.

We will first come to Gautama, the oldest lawgiver, and conclude our extracts by citing texts from Katyayana, who, as we have seen before, is a comparatively modern legislator.

Gautama.

Gautama, Chap. XXVIII:[1]—

"After the father's death, let the sons divide his estate,

"Or, during his lifetime, when the mother is past child-bearing, if he desires it;

[1] Max Müller's Sacred Books, Vol. II.

LECTURE V.

"Or the whole (estate may go) to the first-born; (and he shall support the rest) as a father.

"But in partition there is an increase of spiritual merit.

"(The additional share) of the eldest (son consists of) a twentieth (part of the estate), a male and a female (of animals with one row of front teeth, such as cows), a carriage yoked with animals that have two rows of front teeth, (and) a bull.

"(The additional share) of the middlemost (shall consist of) the one-eyed, old, hornless, and tailless animals, if there are several.

"(The additional share) of the youngest (shall consist of) sheep, grain, iron (utensils), a house, a cart yoked (with oxen), and one of each kind of (other) animals.

"All the remaining (property shall be divided) equally;

"Or let the eldest have two shares,

"And the rest one each;

"Or let them each take one kind of property, (selecting), according to seniority, what they desire,

"Ten head of cattle.

"(But) no (one brother shall) take ten one-hoofed beasts or (ten) slaves.

(If a man has several wives) the additional share of the eldest son is one bull (in case he be born of a later-married wife).

"(But) the eldest son being born of the first-

married wife (shall have fifteen cows and one bull); LECTURE V.

"Or (let the eldest son), who is born of a later-married wife, (share the estate) equally with his younger (brethren, born of the first-married wife);

"Or let the special shares (be adjusted) in each class (of sons) according to their mothers."

Baudhayana, prasna II, kanda 2 :[1]— Baudhayana.

"1. A man may divide his ancestral property equally amongst all his sons without difference;

"2. Or he may reserve for the eldest the best part;

"3. Or the eldest may receive (in excess) one part out of ten, and the rest may divide equally.

"5. If the partition takes place during the lifetime of the father, the cows, horses, goats, and sheep are the share of the eldest."

Apastamba, II, 6, 14 :[2]— Apastamba.

"1. After having gladdened the eldest son by some (choice portions of his) wealth, a man should, during his lifetime, divide his wealth equally amongst his sons, excepting the eunuch, the mad man, and the outcast.

"6. Some declare that the eldest alone inherits.

"7. In some countries gold, (or) black cattle, (or) black produce of the earth is the share of the eldest.

[1] West and Bühler's Digest. [2] Max Müller's Sacred Books, Vol. II.

LECTURE V.

"10. The preference of the eldest son is forbidden by the Sástras.

"14. Therefore all (sons) who are virtuous inherit."

Vas'ishtha.

Vas'ishtha, Chap. XVII:—

"23. The eldest receives two shares, and the best of the kine and horses. The goats, sheep, and the house belong to the youngest; black iron, the utensils, and furniture, to the second."

Manu.

Manu, Chap. IX:—

"*a.* 112-113. The portion deducted for the eldest is a twentieth part (*of the heritage*), with the best of all the chattels; for the middlemost, half of that (or a fortieth); for the youngest, a quarter of it (or an eightieth). The eldest and the youngest respectively take their just mentioned portions; and if there be more than one between them, each of the intermediate sons has the mean portion (or the fortieth).

"*b.* 114. Of all the goods collected, let the first-born (if he be transcendantly learned and virtuous) take the best cattle, whatever is most excellent in its kind, and the best of ten (cows), or the like.

"*c.* 115. But among brothers equally skilled in performing their several duties, there is no deduction of the best in ten (or the most excellent chattel); though some trifle, as a mark of greater veneration, should be given to the first-born.

"116. If a deduction be thus made, let equal shares of the residue be ascertained (and received); but if there be no deduction, the shares must be distributed in this manner: Lecture V.

"*d.* 117. Let the eldest have a double share, and the next born a share and-a-half (if they clearly surpass the rest in virtue and learning); the younger sons must each have a share: (if all equal in good qualities, they must all take share and share alike)."

Yajnavalkya, II:—

"114. When the father makes a partition, let him separate his sons (from himself) at his pleasure, and either dismiss the eldest with the best share, or if he choose, all may be equal sharers.

"117. Let sons divide equally both the effects and the debts, after (the demise of) their two parents."

Narada:[1]— Narada.

"Whether the father distribute equal shares to his sons, or give more wealth to some and less to others, such shall be their shares; for the father is lord of all.

"2. Let sons divide, after the father's death, his wealth according to the order (of their seniority).

"13. It should be known that the eldest receives a larger share (upon partition after the father's

[1] Colebrooke's Digest, V. 32.

LECTURE V.

death), and it is recorded that the youngest receives a smaller one. The rest should take equal shares, and so should an unmarried sister."

Vishnu.

Vishnu:—

"Let sons produced by wives of equal class receive equal shares, but give the best chattel with a deducted allotment to the first-born."[1]

Vrihaspati.

Vrihaspati:—

"Two modes of partition among heirs (during the lifetime of the father) are expressly mentioned; one with attention to priority of birth, and the other with equality of allotment.

"The eldest, (or he who is pre-eminent) by birth, science, and virtuous qualities, shall receive (after the death of the father) two shares of the heritage, and the rest shall share alike; but he is (venerable) like their father."[2]

Katyayana.

Katyayana:—

"If a father, during his life, divide the property, he shall not prefer one of his sons, nor exclude one of them from a share, without a sufficient cause."[3]

Struggle between the rival doctrines of primogeniture and equal distribution of property at last ended in the ascendency of the latter.

We have quoted the ancient legislators in the order of time in which they are supposed to have flourished. The extracts are given in full in order to mark distinctly the gradual decline of the rule of primogeniture, and the rise and progress of the

[1] Colebrooke's Digest, 54. [2] *Ibid*, 45. [3] *Ibid*, 37.

principle of equal distribution. It will be seen that the struggle between the two principles was very severe. The rule of primogeniture did not collapse all at once, nor did the principle of equal distribution establish its supremacy without great difficulty. The two principles were at first associated together. The family ties slackened, and the individual gained his rights. The rights of the first-born were no longer considered to be of divine origin, and the separation of the individual members from the family gradually became complete. The strife between the representatives of the two parties was so bitter that no slight concession would satisfy any of them. Gautama proposed six modes of distribution; Baudhayana and Manu four. The very fact of so many principles of distribution being discussed shows that ancient society had ranged itself into many hostile sections, each clamouring to have the largest share in the division of the heritage. The principle of equal distribution must have made considerable progress before the time of Gautama. He, in fact, does not seem to favor the rule of primogeniture at all. In his opinion, "there is an increase of spiritual merit" in partition. This in substance is a strong recommendation to *divide* the heritage among the sons of the deceased, and is a clear indication of the inevitable decay of the principle of primogeniture. Let the eldest son, says Gautama, receive the whole estate, if the honor and prestige of

the family must be maintained, and if its corporate character cannot be destroyed. There is, however, a strong party in his time, who are staunch supporters of individual rights, and who would on no account suffer the first-born to monopolize the paternal property and tyrannize over his brethren. The spirit of liberty is abroad, and the reign of iron despotism is over. *All* the brothers, the sons of the same father, must be treated as *equals*, and the first-born must *not* be distinguished from his brethren. Public opinion was not yet, however, in such an advanced state as to give unqualified support to the principle of *equal* distribution. "As soon as the eldest son is born, the father owes no debt to his progenitors;" the eldest son, therefore, must be honored and respected before the rest. A distinction must be made. Well, let him receive an additional share of the "twentieth" part of the estate; and if this will not satisfy the advocates of equal "distribution," let him get "two shares, and the rest one each." There still seems to be a difference of opinion on this point, and there are people who are not satisfied with even the "twentieth," or the "double" shares given to the eldest. They would divide the property in different proportions, and give the choice of the best portions to the sons according to their seniority. All this shows that the law of inheritance was not uniformly fixed. Different groups of families adopted different laws

of inheritance, and followed different rules of procedure. The rule of primogeniture having lost its binding force, no other uniform law was substituted in its place ; and the law of succession continued in this unsettled state for a very long time. The corporate rights of the family and the independent rights of the individual members would not coalesce. They were blended, and modified, and at last, long after Gautama published his laws, the principle of primogeniture had to give up the struggle, and yield its place entirely to its rival principle.

Polygamy its effect on the law of division.

At the time when Gautama was promulgating his rules of inheritance, a great evil, which is inseparable from a polygamous state of society, had become manifest. As soon as the old restraints were loosened, as soon as the family ceased to hold together, and the individual members freed themselves from the salutary subjection of the patriarch, the evils of polygamy showed themselves. All the wives of the husband strove to secure his property for their own issue. The rule of primogeniture would have continued in full force for a very long time in India, had polygamy not existed in the country. Polygamy is adverse to the rule of hereditary succession. It requires no explanation to make it clear to you that, in polygamous societies, the form of primogeniture will always tend to vary. Many considerations may come into play in constituting a claim on the succession, the rank of the mother, for

LECTURE V.

example, or her degree in "the affections of the father." That the evil we speak of was creating important changes in the laws of the country, is sufficiently apparent from the language of the oldest legislator. The rivalry between the first-married and the later-married wives was growing intense, and our legislator had no alternative but to soothe the irritated feelings of termagant wives, and to lay down that the shares of the paternal estate among the sons might be adjusted according to their different mothers. This is a new principle of division, and would not have been tolerated in the patriarchal state of society. The good sense of the veterans of Hindu society, however, soon perceived the evils of such a system, and discarded it altogether in later times from their codes of law. Even in the time of Manu the state of opinion on this point was divided, and the great legislator was *doubtful* what principle of division should be adopted in case "a younger son was born of a first-married wife, after an elder son was born of a wife last married." He at first gives way to popular prejudices, but having at last made up his mind says, that "there can be no seniority in right of the mother; but the seniority ordained by law, is according to the birth."[1]

Exclusive right of the eldest

No legislator after Gautama shows the slightest inclination to allow the eldest son to take exclusive

[1] Manu, IX. 122, 125.

possession of the paternal property. Almost all of them are of opinion that either an additional share, or a choice portion of the wealth, should be given to him as a mark of respect to his prior birth, and that is all. Manu thinks that even this mark of respect may be omitted, if the eldest is not distinguished from the other sons by pre-eminent learning or scientific skill. All of them are decidedly of opinion that an equal share should be given to each son. They are not, however, yet prepared to make an unqualified assertion. They are obliged to point out that *some* difference in the treatment of the eldest son is prescribed by popular usage. There are groups of families they say in which the eldest receives the best part of the wealth, or a double share, or a preferential share, of one-tenth or one-twentieth of the property. Apastamba, however, and after him Yajnavalkya, would not yield an inch of ground to popular prejudice. They advocated thorough reforms. Apastamba was for giving to the eldest son a present of *some* value, though, according to him, it should not be so valuable as materially to affect the equality of the shares. Yajnavalkya would make no distinction whatever. "Let the sons," he says, "divide the wealth of their deceased father *equally* amongst themselves." If the father, however, makes any *unequal* distribution of his property during his lifetime, such *unequal* division is binding upon all the sons.

LECTURE V.

son to inherit the paternal property not favored by legislators since the time of Gautama.

His right to an additional share or to some special present recognized in certain families by custom.

But denied by Apastamba and Yajnavalkya.

"A legal distribution," according to him, "made by the father among his sons separately with greater or less shares is pronounced valid."[1] In other words, the father may, during his lifetime, dispose of his property among his sons in any way he thinks proper; but if he dies without effecting any partition, the law of the country will recognize only one mode of division. All the sons will be equal in the eye of the law, and all of them will *equally* share "both the effects and the debts" of the father. Katyayana will not even allow this privilege to the father, the privilege we mean, of unrestrained exercise of choice or will with regard to the distribution of property among the sons of the same father. If any *unequal* distribution is made, good and sufficient cause for such unusual departure from the prescribed rule must be shown, or such unequal distribution will not be held valid by law.

Power to dispose of property by will.

If we carefully analyze the extracts given above, we cannot avoid noticing a singular fact with regard to the disposition of property. The question, whether the Hindus possessed testamentary powers, has often been discussed. It is not our province to enter into the question; but we may be allowed to remark in passing that there is abundant evidence to show that, from the earliest

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[1] Yajnavalkya, II, 116.

times, the Hindus exercised the power of voluntary disposition within a narrow sphere. In a patriarchal state of society the exercise of such a power is unnatural and impossible, but as soon as there was the slightest sign of the segregation of the individual from the family, voluntary disposition of property became a recognized institution. "Manu," we read in the Tattiriya Brahmana, "divided his wealth among his sons," and the rule of primogeniture was violated. The medieval legislators all recognized this method of distribution, and social sanction must have been given to such a mode of procedure. But it should be distinctly borne in mind that voluntary disposition of property was allowed only to a certain extent. A father might make any distribution he thought proper among his sons, but he could *not* give away his property to a stranger; and it is very doubtful if he could deprive any of his children of their legitimate share.

Testamentary power not co-extensive with that of making partition or disposition *inter vivos.*

A will, however, takes effect after the death of the person making it. It is the legal declaration of a person's mind as to the manner in which he would have his property or estate disposed of *after his death.* All the evidence we have in ancient records points to the conclusion that the father possessed the power of making a partition of his *self-acquired* property during his lifetime, but it does not appear that he possessed testamentary powers, properly so called. He could divide his property among his

LECTURE V.

sons during his lifetime, and such division was held to be valid; but we do not see that the law gave him any power to make a will or declaration as to the manner in which he would have his property disposed of *after his death.* We will not give our reasons for this opinion. We leave the elucidation of this subject to future inquirers.

Principle of graduating social position of different kinds of sons.

On failure of sons of the body born in lawful wedlock, the other classes of sons inherited the paternal estate. All these groups of sons were classified, and their exact position in the social scale was strictly defined. The principle which guided the legislators in their classification is not easy to discover. But it should be remembered once for all that the real object of admitting strangers within the family circle, and amalgamating them with the brotherhood, was the *recruiting* of the family by factitious extensions of consanguinity. Real bonds of consanguinity, however, were preferred to artificial ties of blood. Wherever, therefore, there was the least trace of blood connection between the strangers and the members of the original brotherhood, it was eagerly seized upon to enlarge the limits of the family. Blood relationship, tainted or unalloyed, had greater claims than any other relations artificially created. Even the illegitimate sons of a family would have greater attachment for it than strangers, however kindly treated. The illegitimate sons were descended from a com-

Blood relations preferred to strangers.

mon ancestor, and they had no necessity to "*feign themselves*" descended from the same stock as the people on whom they were engrafted. They came of the same stock, and it was no wonder, therefore, that they warmly engaged themselves in the service of the family. Their interests were in every respect identical with those of the original brotherhood. They were, for this reason, treated with greater consideration than other persons adopted into the family group. We shall expect to find, therefore, that a sharp line of demarcation was made by legislators between the legitimate and the illegitimate children of the family, and other strangers who were admitted into the group and bore the family appellation.

Sons classified into "heirs" and "kinsmen."

The ancient legislators divided the different classes of sons into two groups. The first were called "heirs and kinsmen," and the members of the second group were dignified with the name of "kinsmen," but were not *heirs*.[1]

Each including six different kinds.

Both the groups contained *six* classes of sons each. The members of the second group were considered inferior in social status to those of the first group. There were thus twelve classes of sons, who formed a part of the family.

Let us see who these were, and what were their rights and privileges.

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[1] Manu, IX, 158.

LECTURE V.

Enumeration of various classes of sons by Harita.

Harita enumerates the sons in the following order:—

"1. A son begotten of a faithful wife by the husband himself, the son of his wife begotten *by a kinsman*, a son by a twice-married woman, the son of an unmarried girl, the son of an appointed daughter, and a son of concealed birth, are heirs to kinsmen.

"2. A son given *by his parents*, a son bought, a son rejected, the son of a pregnant bride, a son self-given, and a son made *by adoption*, are not heirs to kinsmen."

Vas'ishtha thus defines them:—

Vas'ishtha.

"The first among these is the son begotten of his legally married wife by the husband himself.

"The second is the son lawfully begotten of a man's wife or widow by a kinsman.

"The third is an appointed daughter. It is known that the 'girl who has no brother comes back to the males of her own family, to her father, and the rest, and returning she becomes their son.' Here follows the verse to be spoken by the father when appointing a daughter, 'I shall give thee to the husband, a brotherless damsel decked with ornaments; the son whom she may bear, be he my son.'

"The fourth is the son of a remarried woman. She is called remarried who, leaving the husband of her youth, and having lived with others, re-enters his family. She is also called remarried who

leaves an impotent, outcast, or mad husband, or who after his death takes another lord.

"The fifth is the son of an unmarried girl. They declare that the son whom an unmarried damsel produces, though best in her father's house, belongs to his maternal grandfather. Now in regard to this matter they quote also the following verse: 'If an unmarried daughter bear a son, begotten by a man of equal caste, the maternal grandfather has a son through him; he shall offer the funeral cake, and take the wealth (of the grandfather).'

"The son of concealed birth is the sixth. They declare that these six are heirs and kinsmen, and preservers from a great danger.

"Now follow those sons who are not heirs. Amongst these the first is he who is received with a pregnant bride. The son of a damsel who is married pregnant is called a son received with the bride.

"The adopted son whom his father and mother give, is the second.

The third is the son bought. That is declared by the story of Sunahsepha—'Harishchandra, in truth, was a king. He bought the son of Ajigarta, who sold his son.'

The fourth is the son self-given. That is also declared in the story of Sunahsepha: Sunahsepha, in truth, when tied to the sacrificial stake, praised the gods; the gods loosened his bonds. To him

LECTURE V.

spoke each of the officiating priests, 'He shall be my son.' Viswamitra was the *hotri* priest at that sacrifice; he became his son.

"The son rejected (or cast off) is the fifth. He is called so, who, cast off by his father and mother, is received as a child.

"They declare that the son of a woman of the Sudra caste is the sixth. These are the sons who, though kinsmen, do not inherit.

Now they quote also the following rule. 'These last mentioned six sons take the wealth of him who has no heir belonging to the first mentioned six kinds.'"

The two enumerations are not wholly in accord as regards order.

It will be observed that Vas'ishtha's order of enumeration of sons of the first group is slightly different from that of Harita. The disturbing element was the "appointed daughter's son."

"Putrika-putra," or appointed daughter's son, explained.

It is necessary to explain the term *putrika-putra*, or "appointed daughter's son," before the exact position which was assigned to him could be understood. The term was taken in several senses.

By Hemadri.

Hemadri, an eminent commentator and writer on ceremonial usages, thus explains it: "Putrika-putra is of four descriptions. The first is the daughter appointed to be a son. She is so by a stipulation to that effect. The next is her son. He obtains of course the name of 'son of an appointed daughter,' without any special compact. This distinction, however, occurs; he is not in the

place of a son, but in place of son's son, and is a daughter's son. The third description of son of an appointed daughter is the child born of a daughter who was given in marriage with an express stipulation in this form, 'The child, who shall be born of her, shall be mine for the purpose of performing my obsequies.' He appertains to his maternal grandfather as an adopted son. The fourth is a child born of a daughter who was given in marriage with a stipulation in this form, 'The child, who shall be born of her, shall perform the obsequies of both.' He belongs as a son, both to his natural grandfather and to his maternal grandfather. But, in the case where she was in thought selected for an appointed daughter, she is so without a compact, and merely by an act of the mind."[1]

Now we read in the Rig-Veda:[2]

In the Rig-Veda.

"1. The sonless father regulating the contract refers to his grandson, the son of his daughter, and relying on the efficiency of the rite, honors his (son-in-law) with valuable gifts: the father trusting to the impregnation of the daughter, supports himself with a tranquil mind.

"2. A son, born of the body, does not transfer paternal wealth to a sister: he has made her the receptacle of the embryo of the husband; if the parents procreate children, one is the performer of holy acts, and the other is to be enriched with gifts."

[1] Mitakshara, I., 11 note. [2] Rig-Veda, III, 31. 1—2.

32

LECTURE V.

These two verses are very obscure in the original. They may be interpreted, however, in the following manner. We quote from Dr. Wilson:—

"A son, by virtue of holy acts,—that is, it may be inferred, the worship of manes, although not so specified,—is the heir to the exclusion of a daughter, as she by marriage conveys the property to a different family: she is, however, to be enriched with gifts, upon her marriage, it may be supposed by way of dower. In default of a direct male heir the son of a daughter is to perform the rites, and consequently inherit the property: but this applies only to the son of an appointed daughter, who, according to all the oldest authorities, was considered equal to a son; and the term used in the passage quoted above, evidently comprehended this stipulation or appointment."[1]

Gautama places him in the category of kinsmen.

We thus find that the Veda gives to the "appointed daughter and her son" a position second only to that of the body born in lawful wedlock. Gautama, however, would not place them in the first, he placed them in the second group. They were thus acknowledged to be "kinsmen," but not *unqualified* "heirs." According to Gautama, "they might claim the family-name of their adoptive fathers, and a fourth part of the paternal estate, if there were no sons begotten in lawful wedlock, nor other superior claimants." Their position, therefore,

[1] Wilson's Rig-Veda, Pref. to Vol. III.

was, in every respect, inferior to that of members of the first group. The reason which probably induced Gautama to give them a secondary position was, that the daughter, appointed or not, was transferred by marriage to another family, and was entirely cut off from her father's family. Her sympathies and those of her son would be more with her husband's relatives than with her paternal kinsmen. There was blood relationship, it is true, between them and the family of her father, but the tie of kinship in this instance counted as nothing, when opposed to the stronger influences emanating from the brotherhood to which the husband belonged. Persons identified with other corporations could not be expected to serve the brotherhood with that earnestness and zeal which were absolutely required by the presiding genius of the family. Gautama must have reasoned in this way when he ignored the superior claims of the appointed daughter and her son. Baudhayana, who followed Gautama, dissented from his predecessor, and believing that the real ties of blood are always stronger than artificial bonds, transferred the appointed daughter and her son from the second group, and placed them without any hesitation next to the son of the body, born of a wedded wife. Harita was not so bold; he could not place them so high in the scale. The other legislators who followed Harita, however, gave them the position which

Baudhayana assigns his place next to the son born in wedlock.

Harita and others rank him as kinsman and

LECTURE V.

heir capable of inheriting in default of superior claimant.

naturally belonged to them, and thus the appointed daughter and her son were recognized as kinsmen and heirs who succeeded to the paternal property in default of superior claimants.

Appointed daughter's son and wife's illegitimate son both discarded by Vrihaspati.

If we pass over this disturbing element, we shall find that the main features of the classification of the different legislators corresponded with each other. The appointed daughter and her son and the son of a wife begotten by an appointed kinsman, long contended, with varied success, for the second place in the first group, and the contest was undecided, till, after the time of Apastamba, the deathblow was given by Vrihaspati to the claims of the illegitimate son of a wife; and the appointed daughter and her son remained victorious in the field.

Legitimacy the principle of classification with Gautama, Baudhayana, & Manu.

It should be noticed that Gautama, Baudhayana, and Manu adopted a principle of classification different from that mentioned above. They placed the son given, the son made, the son of concealed birth, and the son cast off in the first group. The principle of legitimacy, the holy tie of marriage, must have outweighed every other consideration with them. The son given, the son made, and the son cast off by their natural parents must have been born in lawful wedlock, and should, therefore, rank above illegitimate sons, whose parentage is at the best doubtful. It may be objected that though the stigma of illegitimacy attaches to the son of concealed birth, yet he is classed as a member of the

favored group. A little consideration will show that the objection is unfounded. Baudhayana thus defines a son of concealed birth: "He is called 'a son of concealed birth' who is secretly born in the house, and whose existence is afterwards recognized." He may be born secretly in the house, but when he is acknowledged as a son,—as a son born of wedlock,—the stigma of illegitimacy is removed from him, and he takes his legitimate place as a kinsman and an heir. The fact of his birth being "concealed," however, carries its own penalty with it. He is reduced to the lowest grade in the scale.

Blood relationship with Harita & others.

While this was the reasoning of Gautama, Baudhaya, and Manu,—Harita, Yajnavalkya, and their followers argued that the son of a wife, the son of an unmarried girl, of a widow remarried, and of concealed birth, belong by the female side at least to the family of the deceased, and are *possibly* the sons of *some* member of the family. Their affinity, therefore, was stronger than that of a stranger,—such as the son given, the son made, the son bought, and the son cast off, the son self-given,—affiliated with the family. In the ordinary affairs of life, and in time of need, those connected by ties of blood would be of far greater service to the family than those whose relationship was artificially created.

Sons other than those born in wedlock are now

The history of the son given and adopted, and the son made, is instructive and interesting. While all other classes of sons have disappeared, the son

LECTURE V.

extinct, except the son given and the son made.

given and the son made still hold their own, and are recognized by society. The son made is received in Mithila in the place of the son begotten of the wedded wife, while in Bengal and most other provinces, the son given and adopted occupies a rank next only to the son of the body. It may be remarked by the way, that some suppose that the practice of appointing brothers to raise up male issue to diseased, impotent, or even absent husbands, is recognized in Orissa only, and in no other province in India. Among the higher classes in Orissa, even this practice, we understand, is *greatly* reprobated.

Son given.

We were speaking of the history of "the son given." You remember Vas'ishtha's definition of this "son." Let us hear what Baudhayana says about him: "He is called a son given (or an adopted son) who, being given by his father and mother, or by either of the two, is received in the place of the child." It will be remarked that there is no material difference between the two definitions. Vas'ishtha in another place enjoins and explains the ceremonies which should be observed when a son is adopted. With the ceremonies themselves we have nothing to do at present. Suffice it to say, that the greatest precautions were taken to give legality to the proceedings observed at the time of adoption. "He who means to adopt a son," says Vas'ishtha, "must assemble his kinsmen, give humble notice to the king, and then, having made an oblation to fire

with words from the Veda, in the interior of his dwellinghouse, he may receive, as his son by adoption, a boy nearly allied to him, or *on failure of such*, even one remotely allied : but if doubt arise, let him treat the remote kinsman as a Sudra."

LECTURE V.

The practice of adoption a very ancient one.

The practice of giving away children for adoption must, as we have remarked before, be of very ancient date. We read in the Taittiriya Sanhita (7, 1. 8), that "Atri gave his children to the son of Urva, who longed for a son. Then he felt lonely, and saw that he was without power, weak, and decrepit." Atri gave away his children for adoption into another family, and seeing that his own family was weakened by this inconsiderate act, must have greatly repented of what he had done. But there was no help, the thing was done, and could not be undone. The worst of it was that his act established a precedent, and other persons followed his example, and thus the practice of adoption became deep-rooted in the community. This was the origin of adoption.

How it originated.

Adopted son how treated at first.

The adopted son, however, was not treated kindly, for a long time, by the ancient legislators. Gautama, Baudhayana, and Manu placed him in the favored group, it is true, but the other legislators showed very little favor to him. They sent him down to the second group, to rank with the son bought, the son cast off, nay even with the son of a Sudra, who was denounced in the strongest language as a "living corpse."

LECTURE V.

Rules as to the class of persons from which adoption is allowable.

Atri declared that an adopted son might be taken from "any one whatever," whether he belonged to the same class as the adoptive father, or to a different tribe.[1] Learned commentators believe that Manu was of opinion that "even a *Kshtriya*, or a person of any other inferior class, might be the *adopted* son of a Brahmana.[2] Yajnavalkya laid it down, "one of the same class presents the funeral cake, and participates in a share, but the filial relation of one of a different class is not denied." Even so late a writer as Katyayana declared, that "if they (adopted sons) be of a different class, they are entitled to food and raiment." We thus see that the ancient legislators did not absolutely prohibit *adoption* from a different class. *Any* child that was offered by his parents was gratefully accepted by the adopter, and affiliated with the family. It is true that Vas'ishtha suggested that a kinsman *alone* should be adopted, but his rule was more honored in the breach than in the observance. Ages after Vas'ishtha laid down this rule his law was strictly enforced, and Sankha ordained that "the adoption of a son by Brahmana must be made from amongst *sapindas* or kinsmen connected by an oblation of food; or on failure of these, *asapinda*, or one not so connected; otherwise let him not adopt."[3] "If one of a different class," he says in another place,[4] "should however, in any

[1] Dattaka Mimansa, Sec. 1.

[2] Dattaka Chandrika, I, 14.

[3] Dattaka Chandrika, I, 10.

[4] *Ibid*, VI, 4.

instance, have been adopted, as a son, he should make him the participator of a share." The rule of Vas'ishtha has been made absolute at the present day, but great latitude was allowed in the interpretation of it in early ages.

Adopted son's position in the list of sons.

We have said before that the son given or adopted did not occupy, in remote ages, the high position which he fills at the present day. Gautama, Baudhayana, and Manu showed great consideration for him, but the other legislators rigidly excluded him from the first group of heirs. It was only when Vrihaspati, following the example of Apastamba, waged a war of extermination against all illegitimate sons, and dethroned them from the high position which they had obtained as a prescriptive right, that the *adopted* son regained the place assigned to him by Gautama, but subsequently denied to him by Harita and his followers. The meaning of Vrihaspati's words cannot be mistaken: "A son given, a son rejected, a son bought, a son made, and a son by a Sudrá,—these, if pure by class and irreproachable in conduct, are held in a moderate degree of estimation. The son begotten of a wife is contemned by good men; and so is the son of a twice-married woman, the son of a young woman unmarried, the son of a pregnant bride, and a son of concealed birth." From the time of Vrihaspati the corporate systems which prevailed in ancient times were completely shattered, and the reign of blood-

LECTURE V.

affinity in family organizations was utterly destroyed. Other principles of conduct came into force, and society began a new career of progress in obedience to the laws of advancing civilization.

Tabular view of the position of different kinds of sons according to different legislators.

A glance at the following table will show the different positions which were given to different classes of sons by the ancient legislators of India.

Different Classes of Sons.	Gautama.	Baudhayana.	Harita.	Yama.	Vas'ishtha.	Sankha.	Manu.	Yajnavalkya.	Narada.	Vishnu.	Devala.	Vrihaspati.	Katyayana.
The natural son ...	1	1	1	1	1	1	1	1	1	1	1	1	1
An appointed daughter's son	10	2	5	3	3	3	...	2	3	3	2	2	...
Son of a wife ...	2	3	2	2	2	2	2	3	2	2	3	8	2
A son given ...	3	4	7	9	8	9	3	7	9	8	9	3	3
A son made ...	4	5	12	10	...	.	4	9	11	...	11	6	5
Son of unknown parentage	5	6	6	6	6	6	5	4	6	6	5	12	9
Son rejected ...	6	...	9	7	11	7	6	12	8	11	6	4	7
Son of an unmarried girl...	7	7	4	5	5	5	7	5	4	5	4	10	8
Son of a pregnant bride ...	8	8	10	8	7	8	8	11	5	7	7	11	10
Son bought ...	12	9	8	11	9	10	9	8	10	9	12	5	4
Son of a remarried woman	9	10	3	4	4	4	10	6	7	4	8	9	11
Son self-given ...	11	11	11	12	10	12	11	10	12	10	10	...	6
Son of a slave ...	...	12	...	...	12	11	12	...	...	12	...	7	12

LECTURE VI.

PRINCIPLES OF SUCCESSION IN THE MIDDLE AGES—(*Contd.*)

Principles of the law of succession on failure of sons—Gautama—Baudhayana—Apastamba—Vas'ishtha—Sankha—Parasara—Manu—Briddha Manu—Yajnavalkya—Vishnu—Vrihaspati—Katyayana—Examination of Gautama's rule—Its want of precision accounted for — Baudhayana's rule more precise—By specifying the heirs—Grandsons and great grandsons—Distinctly made mention of in consequence of their helpless condition—Collaterals—Included in the genus Sapindas—Rules of Apastamba and Vas'ishtha compared—Women; their claims not recognized by these legislators—Exception in favor of an appointed daughter—Gautama's caution against marrying a brotherless woman—Baudhayana on the dependence of women—His view upheld by Vas'ishtha—Exclusion of women from inheritance—Due to their incompetence to govern the family as its head—Widow, mother, and daughter placed on the list of heirs by some legislators—With no practical result—Widow mentioned with reservation by Gautama—Daughter—Mentioned by Apastamba in the sense of appointed daughter—Mother and widow: their rights first recognized by Sankha—Daughter: her position on the list of heirs assigned by Parasara—Manu's futile attempts at harmonizing traditional laws with the state of things in his own time—Illustrated by extracts from his work—His recognition of women's status—Daughter—Widow—Sister—Manu's principle of the law of inheritance is wanting in perspicuity—Spiritual benefit—His indecesion has given rise to various schools of Hindu law—Yajnavalkya's enumeration of heirs—Nephew mentioned for the first time—And Bandhus—Etymological sense of the term—Persons connected together by ties of affection—Limitation of the term to agnatic kinsmen—By Vas'ishtha—Yajnavalkya restricts its meaning to blood relations of the mother—He did not widen its sense to kinsmen related through a female—His omission of the word Sapinda—Maternal relatives reckoned among the heirs—Order of succession determined for the first time—This was rendered necessary by the decay of communism—Which excluded widow and daughter from the inheritance of joint property—The effect of which still lingers over the greater portion of India—Daughter's son passed over by Yajnavalkya in his enumeration of heirs—Though his rights have been acknowledged in other places—Narada's rules of succession, in undivided families—In divided families—His enumeration

LECTURE VI.

of heirs defective—His rules were framed after older legislators without reference to the spirit of his times—His position among the legislators explained — Vishnu — Developed the scheme of Yajnavalkya's order of succession—On the doctrine of spiritual benefit—He gave the daughter's son his present place among the heirs, and excluded sons of tainted blood from inheritance—Vrihaspati carried the development further than Vishnu—His enumeration of heirs includes maternal kinsmen—He recognizes father's rights—The doctrine of spiritual benefit upheld by him—His law of succession as applicable to undivided families—Katyayana's rules the same as those of Vrihaspati—But he has reluctantly admitted the daughter's son as an heir—Summary—Equality of son's right—Adopted son—Son made (Behar); wife's son (Orissa)—Heirs *per representationis*—Son's son and son's grandson—They take *per stirpes*—Widow—Daughter—Daughter's sons, when many in number they take *per capita*—Father, mother—Brother—Brother's son—Paternal and maternal kinsmen—Preceptor, pupil, fellow-student, and lastly the king—Grandmother's position discussed—Theory of spiritual benefit—In the medieval period of Hindu law—Performance of spiritual rites obligatory on the nearest relations—Necessity for connecting inheritance with *pinda*—Doctrine made applicable to cases of disputed succession—The doctrine is not a later innovation on the part of Bengal Brahmins—But is traceable to medieval legislators.

Principles of the law of succession on failure of sons.

LET us continue our examination of the principles of succession in the middle ages. We will first of all quote from the medieval legislators in the order of time in which they flourished. The extracts will give us a fair idea of the gradual development of the laws of inheritance.

Gautama.

Gautama, XXVIII:—

"After the father's death let the sons divide his estate.

"Persons allied by funeral oblations, bearing the same family name, and connected with the same *Rishi*, shall share the estate of a childless owner; or his widow shall take the heritage.[1]

[1] Mitakshara, II, 1, 18; Dayabhaga, XI, 6, 25; Colebrooke's Digest, Vol. II, p. 570.

"Persons learned in the Vedas shall divide the wealth of a childless Brahmana. LECTURE VI.

"The king shall take the property of other castes."

Baudhayana:[1]— Baudhayana.

"Male issue of the body being left, the property surely must go to them.

"On failure of *Sapindas*, or near kindred, *Sakulyas*, or remote kinsmen, are heirs. If there be none, the spiritual preceptor, the pupil, or the priest takes the inheritance. In default of all these, the king."

Apastamba:[2]— Apastamba.

"If there be no male issue, the nearest kinsman (Sapinda) inherits; or, in default of kindred, the preceptor; or failing him, the disciple;

"Or the daughter may take the inheritance.

"On failure of all relations, let the king take the inheritance."

Vas'ishtha, 17:— Vas'ishtha.

"Let the Sapindas or the subsidiary sons divide the heritage of him who has no heir of the first mentioned six kinds (*viz.*, the son of the body, son of a wife, an appointed daughter, son of a remarried widow, son of an unmarried girl, son of unknown parentage.)

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[1] Dayabhaga, XI, 1, 37.

[2] II, 6, 14.

LECTURE VI.

"On failure of them, the spiritual teacher and a pupil take the inheritance.

"On failure of these two, the king inherits."

Sankha.

Sankha:[1]—

"The wealth of a man who departs for heaven, having no male issue, goes to his brothers. If there is none, his father and mother take it; or the eldest wife, or a kinsman, a pupil, or a fellow-student."

Parasara.

Parasara:[2]—

"Let a maiden daughter take the heritage of one who dies leaving no male issue; or, if there be no such daughter, a married one shall inherit."

Manu.

Manu:[3]—

"185. Not brothers, nor parents, but sons are heirs to the deceased; but of him who leaves no son, the father shall take the inheritance, and the brothers.

"187. To the nearest Sapinda the inheritance *next* belongs. Then, on failure of him, a kinsman belonging to the same family shall be the heir; or the preceptor, or the pupil.

"189. The property of a Brahman shall never be taken *as an escheat* by the king; this is the fixed law; but the wealth of the other classes, on failure of all heirs, the king may take."[4]

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[1] Mitakshara, Ch. II, 7. [2] Dayabhaga, XI, 2, 4. [3] IX.

[4] For mother's, sister's, and grandmother's share, see Manu, IX, 212, 217. See also Jolly's Narada, p. 96; Vrihaspati, Colebrooke's Digest, Vol. II, p. 531.

Briddha Manu:[1]— Briddha Manu.

"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain (his) entire share."

Yajnavalkya:[2]— Yajnavalkya.

"The wife, and the daughters also, both parents, brothers likewise, and their sons, kinsmen born of the same family, *bandhus* (cognates), a pupil, and a fellow-student *are the heirs of a person who dies without male issue.*"

Vishnu, 17:— Vishnu.

"The wealth of him who leaves no male issue goes to his *wife;* on failure of her, it devolves on his *daughter;* if she be dead, to the son of a daughter; if there be no such grandson, it belongs to the *father;* if he be dead, it appertains to the *mother;* on failure of her, it goes to the *brothers;* after them, it descends to the *brothers' sons;* if none exist, it passes to the *kinsmen* (bandhu); in default of them, it devolves on relations called *sakulyas;* on failure of these, it comes to the fellow-student; and failing all those heirs, the property escheats to the king, excepting the wealth of a Brahman."[3]

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[1] Dayabhaga, XI, 1, 7. [2] II, 135. [3] Colebrooke's Digest, Vol. II, 542.

LECTURE VI.

Vrihaspati.

Vrihaspati:—

"Let the wife of a deceased man, who left no male issue, take his share, although kinsmen, a father, a mother, or uterine brethren be present.[1]

"As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?[2]

"As the ownership of her father's wealth devolves on her, although kindred exist; so her son likewise is acknowledged to be heir to his mother's and maternal grandfather's estate.[3]

"The mother must be considered as heiress of her son who dies leaving neither wife nor male issue; or with her consent, the brother may be heir.[4]

"On failure of them, uterine brothers, or brothers' sons, paternal and maternal kinsmen, pupils, or learned priests, are entitled to the wealth of the deceased.

"If a man die leaving no issue, nor wife, nor brother, nor father, nor mother, let all kinsmen related by the funeral cake *in equal degree* divide his inheritance in due proportions.

"But half the collected wealth should be first set apart for the benefit of the deceased, and carefully appropriated to his monthly, six-monthly, or yearly obsequies.

"Where many claim the inheritance of a childless man, either paternal or maternal, or more distant

[1] Dayabhaga, XI. 1, 54. [2] *Ibid*, 2, 14. [3] *Ibid*, 2, 17.
[4] 2 Colebrooke's Digest, 550.

kinsmen, he who is the nearest of them shall take the estate."[1]

LECTURE VI.

Katyayana.

Katyayana:[2]—

"Let the widow succeed to her husband's wealth, provided she be chaste; and in default of her, the daughter inherits, if unmarried.

"The widow, being a woman of honest family, or the daughters, or on failure of them the father, or the mother, or the brother, or his sons, are pronounced to be the heirs of one who leaves no male issue.

"If a man die separate from his co-heirs, let his father take the property on failure of male issue; or successively the brother, or the mother, or the father's mother."

Examination of Gautama's rule.

By a careful analysis of the extracts given above, we find that, according to Gautama, the inheritance passes, in default of the different classes of sons, to persons "connected by funeral oblations." With regard to the kinsmen who are competent to present these oblations, he says in another place:[3]—

"On failure of sons, the deceased person's Sapindas, the Sapindas of his mother, or a pupil shall offer the funeral oblations. On failure of these, an officiating priest, or the teacher." Sapinda relationship, again, in his opinion ceases with the fifth or the seventh *ancestor*.[4]

[1] 2 Colebrooke's Digest, 569.
[2] Mitakshara, II, 1, 6, 7.
[3] Ch. XV.
[4] Ch. XIV.

LECTURE VI.

It may be remarked that, at first sight, the ideas of Gautama with regard to succession to property would appear to be very vague. Stripping his phraseolgy of its ecclesiastical technicalities, it would mean that sons inherit the property of their deceased father in the first instance; on failure of them, the inheritance passes to five *or* seven generations of ancestors; and in default of them, to kinsmen in general—persons bearing the same family name. If there be no kinsmen, the property may be claimed by any member of the Spiritual Brotherhood to which the deceased belonged.

Its want of precision accounted for.

Gautama was the oldest legislator, and if we examine the general rule of succession laid down by him *by the light of modern science*, we at once see that his rule of succession, instead of being vague and indefinite, is full of meaning. The preservation of the *family* was the great object of the age in which the legislator flourished. The property must be confined to the corporate group to which the deceased belonged. The son would uaturally succeed to the leadership held by the father, and maintain the family prestige. In default of sons, who but near kinsmen living within the same family circle, and identifying themselves entirely with the corporation, would be able to promote the best interests of the family? It was not necessary to be very precise as to the *exact* persons who should succeed to the privileges enjoyed by the deceased owner; because, it was a

well-understood fact that the person who was *most worthy* would assume the leadership of the family, and maintain the honor and influence of the association. It would rarely happen that any ancestor beyond the fifth would remain alive, when the person who founded the family, collected the family property, and made a name and status for himself, departed this life. If such a contingency did happen, the legislator wisely laid down that the inheritance would ascend to the seventh generation. If the remote ancestors were all dead, which was most likely, at the time the inheritance opened, the ablest and the worthiest kinsman took up the reins dropped by the deceased. In case there was no one who was allied by ties of blood, or in other words, by the bonds of common funeral oblations, the property should justly belong to the Spiritual Brotherhood, of which the deceased owner was a member during his lifetime. The Spiritual Brotherhood we refer to exercised in those times the same functions which belong to the *State* at the present day, and was, therefore, entitled to be acknowledged as the *ultimus hâeres* of the Hindus.

Baudhayana's rule more precise.

Baudhayana was more precise than Gautama. Sons are the natural heirs; on failure of them the *Sapindas* succeeded. Thus far the two rules agree. But Baudhayana defines the *Sapinda* kinsmen with greater precision. Immediately before laying down the general rule of succession, he says: "The paternal great grandfather and grandfather, the father, the man

LECTURE VI.

himself, his uterine brother by a woman of equal class, his son, his son's son, and the son of that grandson,—all these partaking of undivided oblations, sages pronounce *Sapindas*, or near kinsmen allied by funeral cakes; those who share divided oblations, they call *Sakulyas*, or distant kinsmen allied by family."

By specifying the heirs.

Here we see Baudhayana has improved upon his predecessor. Three generations in descent, three in ascent, and his uterine brother, are all recognized as heirs. The distant kinsmen belonging to the same family come in next. They administer to the spiritual welfare of the deceased. There is no mention of the Spiritual Brotherhood of Gautama; but the teacher, the pupil, and the priest are distinguished by name; and "on failure of them the king."

Grandsons and great grandsons.

It is quite clear that the bonds which held together the different members of the family were beginning to be slackened. All who came before, under the spell of the family wand, be they sons, grandsons, brothers, or uncles, must be maintained and treated as inseparable elements of the family group. But when the individual began to separate himself from the tyrannical influence of the family, there might be a possibility, however remote, of repudiating the grandsons and great grandsons of the owner, and depriving them altogether of the maintenance due to them. Grandsons or great grandsons must have been, at the time of the owner's death, of an age when they were utterly helpless. Individuality had

Distinctly made mention of in consequence

asserted its claim, and the promotion of self-interest was the order of the day, and it was very likely, therefore, that the new leader of the family would overlook the claims of the descendants of the last owner. To obviate this, *grandsons* and *great grandsons* were mentioned by name.

of their helpless condition.

Collaterals.

On failure of male issue, the worthiest and the best of the kinsmen assumed, in former times, the government of the family. When, however, there was clashing of interests, when the corporate family was tottering on its foundations, it was natural to expect that the *brothers*, who, after the immediate descendants of the family, were more closely allied to the last owner than other kinsmen, should be recognized as his heirs. His immediate descendants and his parents would of course cherish his memory after his death, and present offerings to him as a tribute of love and affection; but after them his *brothers* would love his memory most and perform offices which would benefit him in the after world. It will also be remarked that the influence of the Spiritual Brotherhoods had considerably declined, and the functions exercised by them were divided among the teachers and priests on the one hand, and the *king* on the other. The authority of the sovereign was more and more established, and the Spiritual Brotherhoods lost their privileges as polical associations.

Included in

We will pass over Apastamba and Vas'ishtha.

LECTURE VI.

the genus Sapindas.

They introduce no new feature in their rules regarding collateral succession. Sapinda relationship ceases, according to both of them, with the seventh generation; and thus both of them apparently admitted the doctrines of Baudhayana. The general rule of *Sapindas* inheriting on failure of male issue is accompanied by no words of explanation, and it would seem from this that the canon of inheritance was too well settled by Gautama and Baudhayana to admit of any discussion.

Rules of Apastamba and Vas'ishtha compared.

It may be remarked in passing, however, that Apastamba was a cynic and a reformer, while Vas'ishtha was a great stickler for the old orthodox school. The former repudiated the doctrine of strengthening family relations by means of subsidiary sons, while the latter vehemently opposed him for these heterodox ideas. Apastamba denied the right of inheritance to the subsidiary sons, and scouted the idea of preferring the eldest son in the division of the paternal heritage. Vas'ishtha advocated the claims of these sons; and apparently acquiescing in the justice of the remarks of his predecessors as regards the rule of primogeniture, tried to effect a compromise between the orthodox and the reformed schools by assigning *two* shares to the first-born as a mark of honor. We have dwelt at length on this subject in a previous lecture, and must, therefore, dismiss it without further comment.

There is one point which deserves special mention. None of these legislators recognize the claims of women to inheritance. They consider them specially unfit to partake of even the least portion of the heritage.

Lecture VI.

Women: their claims not recognized by these legislators.

From the earliest times an exception was made in the case of an *appointed* daughter,[1] and her right was almost universally acknowledged by the ancient legislators of India. But it is characteristic of Hindu jurisprudence that Gautama cautions men not to marry a woman who has no brothers. "Some declare," he says,[2] "that a daughter becomes an *appointed* daughter solely by the intention of the father. Through fear of that, a man should not marry a girl who has no brothers." If he inadvertently does so, the consequence is fatal to *his* family. The sons are all transferred to the family of his wife's father, and he has no claim upon his own children. The very idea of being deprived of a *son* is shocking to the Hindu mind, and Gautama, therefore, thought himself justified in giving this grave caution to his followers.

Exception in favor of an appointed daughter.

Gautama's caution against marrying a brotherless woman.

Baudhayana used stronger language: "Women," he says,[3] "are not known to possess freedom." In regard to this, they quote the following verse: "The father protects a woman in her childhood, the husband during her youth, the son in old age; a woman ought not to have freedom." Nor ought she

Baudhayana on the dependence of women.

[1] Rig-Veda, I, 124. 7. [2] Ch. XIX. [3] II, 2. 27.

LECTURE VI.

to inherit. For the Veda says: "Women are not considered to have a right to use sacred texts, nor to take the inheritance."

His view upheld by Vas'ishtha.

Vas'ishtha fully agrees with Baudhayana that women should be denied all freedom;[1] and he maintains absolute silence with regard to their exclusion from inheritance. This evidently means that women should be kept in perpetual tutelage; when they are unable to take care even of themselves, how can they be expected to take upon themselves the grave responsibilities pertaining to a legal heir. The cares of administering the family property would prove too much for them. They had better be enshrined, therefore, within the *sanctum sanctorum* of the family, and be worshipped as divinities, who would claim as of right the voluntary offerings of their worshippers. Let them be considered as the guardian angels of the family, and be relieved of all the grosser cares of life.

Exclusion of women from inheritance.

The reason of this exclusion of women from inheritance requires no comments. The least consideration will show that they were excluded simply because they were utterly unfit, in those troubled times, to administer the family affairs as sovereigns of the corporation. They must be subject to all the liabilities if they became entitled to all the rights of heirs. The heirs must step at once into all the rights and all the duties of the dead

Due to their incompetence to govern the family as its head.

[1] Ch. V.

man. Women were known as *abalás*, as weak, powerless beings, utterly incapable of preserving the family property from the encroachments of powerful neighbours. We have no Semiramis or Boadicea in Hindu history. There were many women renowned for wisdom and knowledge, but we do not meet with a single example, in those remote times, of a woman invested with the questionable virtues of mighty heroism. Ila, the daughter of Manu, we read in the Rig-Veda, taught the law of sacrifices to the human race, and the wise sayings of Maitreyi, and a host of other women in the classic age are too well known to require any further elucidation. But where was the woman that could repel the attacks of an enemy? This was the virtue which was pre-eminently needed in the ruler of a family. The exploits of *Kali*, the black goddess, and of *Durga*, the Aryan heroine, are enveloped in mythical darkness, which has not yet been dispelled by the light of modern historical researches.

Widow, mother, and daughter placed on the list of heirs by some legislators.

It may be said that Gautama included the widow; Apastamba, the daughter; and Yama and Sankha, the mother and the eldest wife, in their enumeration of heirs.

With no practical result.

It is true that they did so; but the first two legislators must have done so with the greatest reluctance. These females are mentioned as heirs in such a manner as to be unproductive of any practical result. They are introduced at the end

LECTURE VI.

of a long list of kindred and strangers. It could never happen that the deceased would be a person who never belonged to a Spiritual Brotherhood, or never had a teacher, or a pupil, or a priest. It would easily be understood, therefore, that the inclusion of the widow and the daughter in the barren enumeration of heirs by Gautama and Apastamba could not have been meant to serve any practical purpose. They never intended that women should inherit, and they attained the object they aimed at. Women were ruthlessly excluded from inheritance.

Widow mentioned with reservation by Gautama.

It is very doubtful, again, whether Gautama *really* mentioned the widow as an heir. If the canon mentioning the widow be taken with the next clause, it might mean, "if she seek to obtain offspring, she may take the goods of one who left no issue."[1] If this be the correct interpretation of the passage, what our legislator really meant to lay down was, that in case the widow wished to have a son, *lawfully begotten by a kinsman*, she might hold the property in trust for her future son, and was bound to make it over to him when the son was of age. This is not an unlikely supposition, remembering that the son of a wife, *begotten by a kinsman*, was socially and legally recognized in Gautama's age. This very fact also was distinctly alluded to by Manu, when he said that, "If the widow of a man, who died without a son, raise up a son to him by one of his

[1] Mitakshara, II, 1, 18.

kinsmen, let her deliver to that son, *at his full age*, the collected estate of the deceased, whatever it be."[1] Even such a provision, qualified as it is, would have shown a tinge of generosity in Gautama, if he had not put in the widow at the very end of a long string of heirs, including among them kinsmen, near and remote, and utter strangers who could never fail to enter their appearance and claim the inheritance as a matter of right.

Daughter.

The treatment which the daughter received from Apastamba need not surprise us. The spirit which pervades his work clearly shows that he could not tolerate women to partake of the heritage. They are unfit, and must be excluded. Widows are nowhere mentioned as entitled to the least consideration. Knowing his eccentric cynicism, and his aversion to women, it is a matter of considerable doubt whether the *daughter* mentioned as an exceptionable heir by him was an *ordinary* daughter, or an *appointed* daughter, having special claims upon her father. We are inclined to believe that she was the *appointed* daughter. Apastamba repudiated *all* the subsidiary sons, but public opinion with regard to the *appointed* daughter being too strong for him, and she being neither an utter stranger, nor a person with tainted blood, the legislator was obliged to take her in hand, but placed her in a

Mentioned by Apastamba in the sense of appointed daughter.

[1] IX, 190.

LECTURE VI.

position where she had not the slightest chance of ever enjoying her father's property.

Mother and widows: their right first recognized by Sankha.

We thus see that the early legislators ignored the rights of women, and excluded them altogether from inheritance.

Gleams of light were first descried by Sankha in this direction. It was this teacher who first introduced the *religious* spirit into the province of legislation. As *the family* knot became unloosened, the theory of spiritual benefits gathered strength and consistency. "By a son, however produced," said the legislator, "a father prospers; through his oblation of funeral cakes he becomes exonerated from debt to his progenitors." "Heaven is attained by means of him who is celebrated as the father of a son and of a grandson, and whose many children and himself, while living, had completed the study of the scripture and the performance of sacrifice."[1] The doctrine that religious ceremonies then alone become most efficacious when they are performed by a person with his *wife* by his side, had become already established; but it was applied by Sankha in regulating succession. Treating of a different subject he said, that "the influence of the female is great."[2] This saying should certainly not be employed as an argument for his predilection for women, but it cannot be denied that the idea was uppermost in his mind, and must have uncon-

[1] 2 Colebrooke's Digest, 420. [2] *Ibid*, 114.

LECTURE VI.

sciously influenced him in recognizing the rights of the *mother* and the *widow*. Neither the last owner, nor his father, could have *efficaciously* performed sacrifices in honor of gods and ancestors, unless their wives assisted them; and it is but just, therefore, that the mother and the widow, through whose means both his father and himself were spiritually benefited, should share his estate after his death. It should never be forgotten that, from the time of Sankha, the religious principle which played only a secondary part in regulating succession before him, became equal in importance to, if it did not supersede, the principle which recognized the preservation of the family as the first and highest aim of legislation. It was from the time of this legislator that the great struggle between the religious and communistic principles commenced, which ultimately resulted in effecting a compromise that gave to the Hindu world its present Law of Inheritance. The religious principle did not, of course, take all at once the form which is known by the name of "the theory of spiritual benefits," but was gradually moulded into shape by subsequent legislation.

Daughter: her position on the list of heirs assigned by Parasara.

The daughter received her just rights from the hands of Parasara, who is emphatically the legislator for the present age.

The passage relating to daughter's rights is quoted from Parasara on the authority of Jimutavahana, the author of the Dayabhaga. It is strange that

LECTURE VI.

such an authoritative text was not quoted by Vijnanesara, in his Mitakshara, in support of the claims of the daughter. It would be an act of mad presumption, however, in any one to doubt the genuineness of the text, and we must, therefore, satisfy our conscience by *believing per force* that the author of the Mitakshara must have overlooked the passage. This is an article of faith, which it is difficult to accept, it is true; but when the great founder of the Bengal school lays down his dictum that Parasara said that the daughter must inherit, we have no other alternative but to bow our heads, and implicitly believe in the genuineness of the text. Perhaps, because Yajnavalkya, who must decidedly have flourished after Parasara, included the daughter in his enumeration of heirs, the author of the Mitakshara thought it was unnecessary to quote Parasara as an authority on this point. If such was his opinion, how was it that he quoted Vrihaspati and Katyayana, who were comparatively modern authorities, in support of his argument? Be that as it may, we must not raise presumptuous doubts. It is rank heresy to think even for a moment that the quotation might be spurious. We must, therefore, keep silence, and say nothing more about it.

Manu's futile attempts at harmonizing tradi-

Manu occupies an anomalous position in the legal literature of the Hindus. He embodied in his Code the traditions of a former age, but his sympathies

were with a different generation. His prototype, whose name he bore, whose materials he borrowed, and whose Code he versified, belonged to a stratum of society which perhaps was long anterior even to that of Gautama. The author of the present Code belonged to the same age to which Sankha and Yajnavalkya belonged. The society for which his prototype published his laws had grown out of its primitive cell, and had assumed proportions, which would have startled the communistic instincts of the legislators who preceded Gautama. The current of the thoughts of the generation in which Manu lived had changed its original course, and was taking a direction different from that of the preceding age. The communistic principle had lost its ground, and the religious principle had established its footing. The social wants, the thoughts and feelings, the manners and customs of the two ages were entirely different. Manu represented the two opposite poles of thought. It was evidently his object to revivify the fossil remains of the stratum of society for which his master had legislated, and to associate them with the living forms which he witnessed around him. He signally failed in his attempt. The spirit which animated the old legislators was extinct, and could never be brought into life again. What Manu did was simply to gather the fossil laws of a former generation, and to mix them indiscriminately with the laws which

LECTURE VI.

tional laws with the state of things in his own time.

LECTURE VI.

were current in his age. They do not harmonize with each other; but present the appearance of a mechanical mixture in which the materials bear no affinity to each other. He tried at first to adapt the old laws to the social wants of his own generation, but not succeeding in his attempt, he gave it up in despair. The forces which moved society in his time were of an intensity which baffled his utmost endeavours to diminish their strength and make them bear company with a different class of forces which impelled old and wearied limbs. The task was beyond his power.

Illustrated by extracts from his work.

We will give a few illustrations to show how Manu brought together in his Code the laws which belonged to two different ages, and how he failed to harmonize them with each other:

"The younger brothers shall live under the eldest brother as they lived under their father. By the eldest, at the time of his birth, the father having begotten a son, discharges his debt to his own progenitors; the eldest son, therefore, ought to manage the whole patrimony."[1]

Here the duty of maintaining union and preserving the joint family is plainly inculcated.

Now look at the following:—

"Either let them thus live together, or with a wish for the better performance of their several duties, let them live apart; since religious merit is

[1] Manu, IX, 105, 106.

enhanced in separate houses, their separation, therefore, is legal and even laudable."[1] Lecture VI.

Again—

"The eldest brother shall take entire possession of the patrimony."[2]

In the next breath he says:—

"All the sons of twice-born men, born of wives of the same class, must divide the heritage *equally*, after the younger brothers have given the first-born his deducted allotment."[3]

We will give a third example, which is more to the point:—

His recognition of women's status.

If we carefully read the extracts from Manu, which we have given in another place, we come to the irresistible conclusion, that the line of succession, after sons, father, brothers, the nearest of kin, the remote kinsman, the preceptor, or the pupil[4] has entirely closed, and there is no room for further admission. No, Father Manu cannot silence the qualms of his conscience. For a long time he talks of a great many other things to divert his attention from the disagreeable subject, but the shadow repeatedly crosses his path, and he can no longer keep silence. He gives a start, stamps his foot upon the ground, and the fiat goes forth:

"Of a son, dying childless, the mother shall take the estate, and the mother also being dead,

[1] IX, 111. [2] IX, 105. [3] IX, 156. [4] IX, 185, 187.

LECTURE VI. the paternal grandmother shall take the heritage."[1]

As soon as the judgment is pronounced, the great sage turns aside his face, and thinking that the painful duty was at last done, talks volubly of other matters, and tries to forget that he has insulted the memory of veteran legislators by declaring *women* as heirs.

This text has severely tried the forensic acumen of the subsequent legislators. They tried their best to reconcile it[2] with the rules of inheritance laid down in another portion of the treatise,[3] and we cannot conscientiously say that they have satisfactorily performed their task.

Daughter.

Daughters and widows need not lose heart. Father Manu has left an opening for them. His sayings on this subject are like those of the Delphic Oracle. They can be interpreted both ways. Jimutavahana thinks that the text of Manu distinctly recognizes the daughter's right. "The son of a man is even as himself, and as is the son such is the daughter: how then can any inherit his property, but a daughter who is closely united to his soul."[4] Other writers, however, are not of the same opinion as the author of Dayabhaga. They believe that the text points to the succession of the *appointed* daughter. The context does not authorize the interpretation given to it by

[1] IX, 217. [2] *Ibid.* [3] IX, 185, 187. [4] IX, 130.

LECTURE VI.

Jimutavahana. But that does not signify. The daughter, on the strength of this text, can be twisted into the line of heirs sanctioned by Manu.

Widow.

The widow was sharply dealt with at first. She should on no account inherit the property of her husband. She was a woman, and a woman could not be entrusted with the management of the family-estate. But if a son was legally *begotten of her by the brother of the deceased,* a *maintenance* might be given to her.[1] In exceptionable cases, she might even hold the property in trust for her son *so begotten.*[2] The stringent rule laid down in the preceding verse was qualified in the following, and it might fairly be expected there was hope for the widow yet. In his old age, when he saw that the young men of his time were determined to see justice done to the *widow*, he had no other alternative but to give his sanction to the law, that if a widow "kept unsullied her husband's bed, she might be recognized as an heir."[3]

Sister.

Even the *sister* was not entirely forgotten. There is a text which gives a color to the doctrine that *sisters* were acknowledged as heirs by Manu.[4] Should any of the brothers living in common in a *joint* family be deprived of his share by civil death, or by his entrance into a religious order, his vested interest in a share should not be wholly lost,[5] but "his uterine brothers and sisters, and such

[1] IX, 146. [2] IX, 147. [3] Dayabhaga, XI, 1, 7. [4] IX, 212. [5] 211.

LECTURE VI.

brothers as were reunited after a separation, shall assemble and divide his share equally."[1]

Manu's principle of the law of inheritance is wanting in perspicuity.

We will give another illustration in support of our position, and we have done.

If you read the chapter on Inheritance in Manu with any degree of attention, you close it with a certain amount of perplexity in your mind; you are unable to ascertain the principle which, according to Manu, determined the right of succession. Was it propinquity of blood, or was it the principle of spiritual benefits, or was it an union of both? "To the nearest kinsman, the inheritance next belongs."[2] Is the text intended to indicate nearness of kin according to the order of birth, or does it mean the nearness of kin which is determined according to the presentation of funeral offerings? The word used in the text for kinsman is *Sapinda*. Now the word Sapinda is defined in the chapter treating of Impurity.[3] "The relation of Sapinda ceases with the seventh person." There is no mention anywhere in the chapter of *Pindas*, or spiritual benefits, in any shape whatever. You seek in vain for a text which would authoritatively lay down that Sapindas are "kinsmen who are connected by funeral cakes," and as the definition of the word Sapinda occurs in a chapter which does not say a word about *Sráddha*,—which is calculated to confer spiritual benefits on the deceased,—

[6] IX, 212. [7] IX, 187. [8] V, 60.

you rejoice to think that you have at last found the clue to Manu's law of inheritance. It is propinquity of blood which determines the order of succession. The next moment, however, your illusion vanishes. You descend from the cloud-land, and the following texts startle you by their unwelcome appearance, "The funeral cake follows the family and estate."[1] On failure of other heirs, the property may be inherited by the preceptor, the pupil, or learned Brahmins, so that "the rites of obsequies may never fail."[2] We feel staggered, and do not seem to know our own mind. Here are texts which declare in unmistakable terms that inheritance is in right of benefit conferred, and the order of succession is regulated by the degree of such benefit.

Spiritual benefit.

The whole spirit of the text declaring the heritable right of a kinsman breathes communistic ideas—ideas which governed society in the time of Gautama and in that of his predecessors and immediate successors. Is it not likely that the principle of communion was uppermost in Manu's mind when he laid down the rule which should regulate succession? But if we turn again to the text defining the term Sapinda, we find that, in the latter part of it, the term *Samanodaka* is used in contradistinction to Sapinda. This term would only seem to imply an extension of the idea imbedded in the word

[1] IX, 142. [2] IX, 188.

LECTURE VI.

Sapinda. The word *udaka* can never bear a double meaning; and as it is used in juxtaposition with Sapinda, the word *pinda* would seem by analogy to mean "funeral cakes" only. If that be the correct interpretation, Sapindas should certainly signify "kinsmen connected by funeral oblations," or, in other words, the doctrine of spiritual benefits is established by the words of Manu. This argument is strengthened by the occurrence of the following verse immediately after the text declaring the right of sons, father, and brothers,[1] and immediately before the text declaring that, in default of them, the nearest kinsman inherits the estate of the deceased.[2] The verse we refer to is this: "To three ancestors must water be given at their obsequies; for three is the funeral cake ordained: the fourth in descent is the giver of oblations to them; but the fifth has no concern with the gift of the funeral cake."[3] Is not this a clear proof of the intention of Manu to found the right of inheritance on the right of benefits conferred?

His indecision has given rise to various schools of Hindu law.

We will not pursue the subject any further. The fact is, that Manu was on the horns of a dilemma. He did not know how he should shape his conduct —whether he should implicitly follow the teachings hallowed by time; or whether he should cast in his lot with the go-ahead men of his own generation. This indecision has led him to give contradictory

[1] IX, 185. [2] IX, 187. [3] IX, 186.

opinions on most vital points relating to the law of inheritance. The Code of Manu, as a historical record, is invaluable; but if we think that Manu has given in his Code a *clear* and *consistent* exposition of the principles of inheritance, we shall be sorely disappointed. His contradictory language has mainly contributed to the foundation of the different schools of Hindu law.

Yajnavalkya's enumeration of heirs.

Nephew mentioned for the first time.

There were two new features in Yajnavalkya's enumeration of heirs. The first was, that the right of the nephew as an heir was acknowledged for the first time. This right would have naturally flowed from the definition given by Baudhayana of a Sapinda. But Baudhayana had not the courage to recognize the *son of a brother* as an heir. The reason was, that in that early time there was a natural reluctance to extend the range of heirs. The principle which had so long guided succession was, that the eldest member of the family, the worthiest and the best, should manage the affairs of the family, and enjoy all its privileges. To depart from this deep-rooted institution required no little strength of character. A great point was gained, if the rights of the three immediate descendants and ascendants, as well as those of the *brother*, obtained legislative sanction. It was after a great struggle that these rights received social and legislative recognition. To proceed further would have been simply impossible. If the nephew was named as an heir, uncles and

LECTURE VI.

others, who were also nearly related to the deceased proprietor, would clamour for their rights; and it was not advisable, therefore, to mention the nephew by name. If the nephew was admitted at that early stage, there would have been no limit to the addition of fresh claimants, and to avoid this dilemma, Baudhayana was obliged to leave out the nephew as an heir. It was reserved for Yajnavalkya to make a stand for the nephew's rights, and to admit him into all the coveted privileges of an heir.

And Bandhus.

The most important addition made by Yajnavalkya, however, was the recognition of *Bandhus* as heirs.

The word *bandhu* has, for a long time, been the subject of hot controversy in British Courts of Law. It has often been analyzed and dissected, twisted and turned in every possible direction; but it is a matter of no small disappointment that the meaning of the word has not been authoritatively settled up to this time.

Etymological sense of the term.

Persons connected together by ties of affection.

The word *bandhu*, or *bandhava*, is derived from *bandh*, to bind. Those, therefore, who were *bound* together by *ties* of affection, are called Bandhus. This definition, however, is too wide for the purposes of a lawyer. It requires an important limitation.

Relatives and friends are pre-eminently united by *bonds* of love and affection; they are, therefore, ordinarily known as *Bandhus*. Both before and

after Yajnavalkya the term was used in the sense of agnatic kinsmen. The reason for doing so is obvious. Agnatic kinsmen, or relatives by the father's side, were generally members of the same family, and *bonds* of affection are always strong between those who live together and are united by common interests. Vas'ishtha and Manu, who preceded Yajnavalkya, and Vishnu who followed him, used the word in this sense.[1]

LECTURE VI.

Limitation of the term to agnatic kinsmen.

Bandhava is but another form of *bandhu.* The latter form is changed into the former by a simple grammatical affix. These are used as synonymous terms—having no difference of meaning between them.[2] The word *bandhu*, or bándhava, is not only employed for agnatic kinsmen, but is often employed for relatives in general, agnates as well as cognates.[3]

By Vasistha.

Yajnavalkya employs the word *bandhu* in his work in no less than seventeen different places.[4] By comparing the words as used in different places, we find that he does not confine himself to one meaning, but uses them indiscriminately for relatives in general, for *agnates*, for *cognates*, and also as synonymous with *friends.*

Yajnavalkya restricts its meaning to blood relations of the mother.

In the text in question, however, the word is used

[1] Vas'ishtha, Ch. 17 ; Manu, 9, 158 ; Vishnu, Ch. 15.
[2] Manu, 9, 158 ; Yajnavalkya, 2, 147.
[3] Gautama, Ch. 4, 6 ; Vas'ishtha, Ch. 8.
[4] I, 82, 108, 113, 116, 144, 157, 158, 220, 340 ; II, 138, 147, 152, 267, 283 ; III, 11, 239, 294.

LECTURE VI. in opposition to *gotraja*, or kinsmen bearing the same family-name. Agnatic kinsmen alone can bear the same family-name. Here, therefore, we find an important limitation given to the word *bandhu*. The agnatic kinsmen are excluded from its connotation. *Friends*, again, are not recognized as heirs by any system of legislation. They could not, therefore, be included as heirs in the word *bandhu*. So the only possible meaning that could be given to the word is relatives connected through the mother; kinsmen on the mother's side; blood relations of the mother.

This is all that Yajnavalkya could have meant by the word *bandhu*. An extended meaning has been given to the word by legal writers of a period subsequent to that of Yajnavalkya. There are, according to them, three classes of *Bandhus* who share the estate of the deceased. We need not at present discuss the extended acceptation. We reserve the discussion for a future Lecture.

He did not widen its sense to kinsmen related through a female.

We may remark this much, however, that Yajnavalkya, as has been supposed, did not use the word *bandhu* in the sense of kinsmen related through a female. He, in common with the legislators who preceded him, employed another word to signify *kinsmen related through a female*, and this word was "yonisambandha." We will revert to this when we come to discuss the interpretation given to the word *bandhu* by the author of the Mitakshara.

LECTURE VI.

The classification of the *bandhus*, and the calculation of their degrees of proxmity to the deceased, was, therefore, as we have shown above, the work of an after age.

His omission of the word Sapinda.

It is curious that Yajnavalkya did not use the word *Sapinda* in the order of succession given by him. He was familiar with the word, though he uses it very sparingly. He has defined the word in I, 53. Sapindas, according to him, include *seven* generations on the father's side, and *five* only on that of the mother. The definition is intelligible so far as it goes; but how is it that he has an aversion to the use of the word ? In one place [1] a distinction is evidently made between *Sapindas* and *Sagotras* or *Gotrojas*—kinsmen bearing the same family-name. Comparing this verse with that in which the heirs are enumerated, we see that *Gotrajas* with him were all those agnatic kinsmen who came after the nephew. Now, as, according to the verse alluded to above,[2] Sapindas were distinguished from other kinsmen, is it possible that, in the opinion of the sage, the *Sapindas* other than those distinctly mentioned by him had *no* right of inheritance ; and in order to avoid ambiguity he would not, like the other legislators, employ the word *Sapinda* in his enumeration of heirs ? Be that as it may, as Yajnavalkya has not made use of the term, we have no right to explain his language relating to inheritance

[1] I, 68. [2] I, 68.

by any preconceived notions we may have respecting this apple of discord.

Maternal relatives reckoned among the heirs.

To return from this digression. It will be remembered that it was Yajnavalkya who first prescribed obsequial offerings to maternal ancestors and their issue. He did not stop simply after making this declaration in favor of maternal relatives; he gave them also the heritable right. Was it not proper and just, it may be asked, that those who promoted the spiritual welfare of their maternal kinsmen—those who paid to them their humble tribute of love and respect in the shape of spiritual oblations, should also *inherit* their property? Did not justice demand that some substantial reward should be given to those who satisfactorily performed ceremonies which would benefit their kinsmen in the spirit-world? This demand of justice, however, was not satisfied till a long time had elapsed.

Order of succession determined for the first time.

It was Yajnavalkya also who for the first time determined the *order* according to which the heirs should succeed to the property of the deceased. No trouble was taken before to settle this important point. The reason is, as we said before, that when the property is *joint*, and when the profits accruing from the property were enjoyed in *common*, there was no necessity for any elaborate order of succession. It was enough that the rights of the several members of the family were distinctly defined with a view to all the members being *maintained* by the

This was rendered necessary by the decay of communism.

profits of the family property. Partition of the property was *seldom* allowed, and consequently no want was felt for a law which should declare the order of succession. We find that, in the time of Manu, partition and reunion were not unknown.[1] Nay, we find the first trace of it even at the time when Gautama legislated for the country.[2] At the time of Yajnavalkya partition must have been the rule, and not the exception. Every device was tried still to keep up the traditions of the joint family, and to hold the members together. But public opinion was against it, and the sage could not resist its course. He was obliged to yield to the force of the current. It is worthy of special remark that the text declaring the right of succession of the *widow*, *daughters*, and others,[3] was intended for separate property, for property which was in no way connected with the joint and undivided family property. If the property was joint and undivided, another principle of succession applied. The widows and daughters were excluded from inheritance. "A reunited parcener," said the legislator,[4] "shall keep the estate of his reunited co-heir, who is deceased; or shall deliver it to a son subsequently born." In explaining this passage Vijnaneswara says: "The share or allotment of such a reunited parcener deceased, must be delivered by the surviving reunited parcener to a son

Which excluded widow and daughter from the inheritance of joint property.

[1] 9, 210. [2] Ch. 15. [3] II, 138. [4] *Ibid.*

LECTURE VI.

subsequently born, in the case where the widow's pregnancy was unknown at the time of the distribution. Or, *on failure of male issue*, he, *and not the widow, or any other heirs*, shall take the inheritance."[1] There is no distinction made between brothers who have never separated and brothers who have reunited after separation, in respect of the succession to the property of the deceased brother.[2] "Under the Mitakshara," says the British legislator, "a daughter can take a separated share, but has no right as an heiress where the property is held jointly." In the latter case, it is a rule of the Mitakshara law that the widow or the daughter does not succeed, but is only entitled to maintenance.[3]

We must say, however, that the interpretation put upon the words of Yajnavalkya by Vijnaneswara has not gone unchallenged. Be that as it may, it cannot be denied that the text of the sage,[4] just referred to ("a reunited parcener," &c.), distinctly provided for succession in a joint and undivided family, and that here the *associated* brother inherited the property of the deceased. There was no room for the widow or the daughter, if the *brother* succeeded to the estate of the deceased proprietor. There is no other alternative but to admit that the brother excluded the widow and the daughter, when property was held jointly. We can very well understand the reason of this rule. But the

[1] Mitakshara, II, 9. 4. [2] 21 W. R., 30. [3] 12 W. R., 453. [4] II, 138.

communistic principle was on its last legs; and it could easily be foreseen that it would be abolished at no great distance of time. The vitality of Hindu institutions, however, if they once take root, is so great, that the principle still flourishes in its utmost luxuriance in the greater part of the country, and neither material progress nor spiritual enlightenment has yet been able to eradicate the principle of communism from the soil of India. Widows and daughters are excluded, in provinces governed by the Mitakshara law, from inheritance, and we see no sign yet of the emancipation of women from the trammels imposed upon them by Hindu law and Hindu custom.

The effect of which still lingers over the greater portion of India.

Before we leave Yajnavalkya, I should wish to draw your attention to another important point. In the text in which the heirs are enumerated, the legislator does not mention the "daughter's son" as an heir. There is a text, however, immediately preceding it, which may lead us to suppose that the right of "the daughter's son" was not entirely ignored. "Even a son begotten by a *Sudra* of a female slave, may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property, *in default of daughter's sons.*"[1] The Mitakshara, in commenting upon this passage, remarks that,

Daughter's son passed over by Yajnavalkya in his enumeration of heirs.

Though his rights have been acknowledged in other places.

[1] II, 136, 137.

LECTURE VI. "should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, *nor sons of daughters*."[1] As regards the right of the daughter's son the Mitakshara believes that it is *directly* deduced from the language made use of by Yajnavalkya. In the text enumerating the heirs, the sage uses the word "also" immediately after "daughters." The Mitakshara says, that "by the force of the particle 'also,' the daughter's son succeeds to the estate on failure of daughters."[2] To ordinary judgment the particle 'also' is incapable of yielding this meaning; but if this be taken in connection with the preceding text, Vijnaneswara could not be supposed to be entirely unjustified in believing that the right of the daughter's son was acknowledged by the sage. We feel considerable hesitation, however, in giving it as our opinion that "the daughter's son" was enumerated as an heir by Yajnavalkya. If he wished to do so, what prevented him from mentioning in direct terms "the daughter's son" as an heir. Yajnavalkya never minced matters. If he wished to say a thing, he did so with the utmost plainness. Then why this reticence with regard to the right of the daughter's son? It is inexplicable, and we must leave it undecided. The sage must have had great reluctance in admitting him as an heir. In exceptional cases, however, when the contest was between the

[1] I, 12. 2.

[2] II, 3, 6.

daughter's son and the son of a Sudra—"a living corpse," to quote the language of Manu—a daughter's son was probably preferred. It is infinitely better that the son of a daughter should succeed to the property of a man, leaving no male issue born of a wedded wife of his own class, than that the son of a *Sudra* woman, the very touch of whom contaminates a pious Brahmin, should inherit the family-name, and be entitled to all the privileges which are the objects of the legitimate aspirations of the members of the holy caste—the representatives of God upon earth. The connection of a Brahmin with a *Sudra* woman should be branded as infamous. "I know," he says, "that there are men who contract such an unholy alliance, and who are encouraged in doing so by legislators whose opinions are entitled to respect. But if you ask my opinion about it, if I have the least voice in repressing such a scandalous practice, I should lend my cordial support to those who would crush it out of existence. Do not those men who stoop to such a connection remember with fear and trepidation the well-known adage that 'a man is born in his son again'? Here is indeed a splendid prospect for the sacred majesty of the Brahmin! The representative of God on earth is reduced to the level of a *Sudra*—the lowest of the low. The picture is disgusting, and I pronounce my curse upon it."[1]

[1] I. 56.

LECTURE VI.

When such was his opinion, we can easily understand why he would rather give the inheritance to the daughter's son than to the son of a Sudra.

Narada's rules of succession

We have given above no extracts from Narada in illustrating the theory of development. The reason is, that Narada, beyond treading in the footsteps of the older legislators, made no change in his enumeration of heirs. But there is one thing which cannot be passed unnoticed. In the time of Narada, partition and separation of property had become an established institution, and it was found necessary to frame two distinct and separate laws regulating succession in *undivided* and *divided* families. The legislators before Narada had touched upon this subject, but no clear and undisputed rule of practice could be derived from their disquisitions.

in undivided families.

To supply this want, Narada enacted as follows:[1]

"The share of reunited brothers is considered to be exclusively theirs.

"Amongst brothers, if any one die without issue, or enter a religious order, let the rest of the brothers divide his wealth, except the wife's separate property.

"Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the brethren may resume that allowance.

"As regards the daughter of a deceased copar-

[1] Chap. XIII.

cener, her maintenance shall be made out of her father's share; let them support her until her marriage, afterwards her husband shall keep her. Lecture VI.

"After the death of the husband, his kin are the guardians of a childless widow; in the care of her, as well as in her maintenance, they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations within the degree of a Sapinda."

In divided families.

In discussing the rule of succession in divided families, Narada lays down the following rules:—

"After the father's death, the abovementioned sons (twelve classes of legitimate and secondary sons) succeed to his wealth in their order; on failure of the superior, let the inferior in order take the heritage.

"On failure of the son, the daughter inherits; for she equally continues the lineage. A son and a daughter both continue the race of their father.

"On failure of daughters, the nearer kindred inherit, next the remoter relations, next a fellow-caste man; on failure of all, the heritage goes to the king."

His enumeration of heirs defective.

It will be remarked that this enumeration is not full; it is defective in every respect. It would seem that Narada has excluded the widow from inheritance, and in this simply followed the teachings of the older legislators. He could not imitate the

LECTURE VI.

example of Sankha and Yajnavalkya. The right of the daughter, however, could not be overlooked. In all other respects his rule of succession, with regard to collateral heirs, correspond in its main features to that of Manu.[1] We do not find the spiritual preceptor and pupil in Narada, but "the fellow-caste man" supplies their place. Narada evidently belonged to the same school as Manu, but the faults of scientific classification and arrangement noticed in Manu have been avoided by Narada.

His rules were framed after older legislators without reference to the spirit of his times.

It may be a matter of great surprise that Narada, coming after Yajnavalkya, made such a retrograde movement in his enumeration of heirs. His ideas on this subject were old-world-ideas, which had long ceased to exercise any influence on the course of social development. Narada's work shows signs of progress in almost every department of law, then how is it that the ideas of the sage on the subject of inheritance were singularly crude and inflexible? How is it possible that Narada, living in a progressive age, and after framing advanced laws to suit the changed conditions of society, should suddenly alter the whole character of his Code, and, by recording principles of succession which accorded with a primitive social organization, give it the old and wrinkled appearance which does not actually belong to it? There cannot be the shadow of a doubt that, as regards the rules of succession,

[1] IX, 187.

Narada's work does not bear the impress of his age.

Lecture VI.

His position among the legislators explained.

Our surprise will be considerably diminished if we remember that the progress of society is never *continuous* in all its sections. Adverse circumstances often retard the steady progress of ages, and throw back society centuries behind its real date. There could never be a greater mistake than to suppose that social development flows in a continuous stream, bearing along in its impetuous course all obstacles which impede its progress. Here are hidden rocks which often retard the steady advancement of the stream. There are action and reaction, progression and retrogression. Human nature has a strong repugnance to irksome and continuous labour. An age of unusual activity is generally followed by a period of languor, when people tired of revolutionary ideas go back to the old order of things. Narada's law of inheritance is a case in point. Sankha and Yajnavalkya had revolutionized society by their declaration of female independence, and by promulgating laws which recognized female rights equal to those of men. Father Manu was between two fires; he was at one time with the conservative party, and the next moment with the advanced section of the community. Tradition affirms that Narada's work had a closer connection with Manu's Code than is apparent at first sight. We know nothing about such

LECTURE VI.

connection. But it is quite evident to us that his mind was of a stronger calibre than that of Manu. He would not waver in his opinion. He cast in his lot at once with the supporters of the old school. There was a great conflict of opinion about the rights of women — the widow and the daughter. "Women," he said, "have been created for the sake of propagation" alone, and they have no business with the sterner cares of life.[1] "Through independence women go to ruin, though they be born in a noble family; therefore the lord of creatures ordained *dependence* for them."[2] "The widow and the unmarried daughter should merely be *maintained*, and nothing more." And we are free to confess that we have serious doubts whether the *daughter* mentioned as an heir is an ordinary, or the daughter having the special privileges of an *appointed* daughter. No, Narada would not give in to the liberal party; he would rather go back to the adherents of the old-fashioned schools of Apastamba, than yield an inch of ground to the upstarts of his own generation. It was these hated upstarts, however, who triumphed at last, and left Narada, without a single follower, to mourn the degeneracy of his age.

Vishnu.

Vishnu.—The determination of the order of succession was properly the work of Vishnu. This legislator worked out and fully developed the plan, which was given in its merest outline by Yajna-

Developed the scheme of Yajnavalkya's order of succession.

[1] Ch. XII. [2] Ch. XIII.

valkya. It was Vishnu also who assigned his proper place to the son of the daughter—namely, immediately after his mother.

On the doctrine of spiritual benefit.

The doctrine that "he who is heir to the estate is the giver of funeral cakes"[1] was clearly and distinctly laid down by Vishnu. This doctrine was also recognized in its fullest extent before him, but as no *direct* text was found to authorize it, doubts were entertained as to the propriety of applying in practice a doctrine which could not be pointed to in any distinct form. We arrived at it, it is true, by a process of reasoning, but its corporeal form was not easily met with. To obviate this difficulty, and to set the matter completely at rest, Vishnu passed his judgment that the right of inheritance is in right of spiritual benefit. The clearest proof of his earnestness in the matter—the clearest indication of his belief that the doctrine is universally true—is that he applied the doctrine in all cases of disputed succession. To determine whether a given person is heir to the estate of the deceased proprietor, find out whether he is competent to perform the funeral obsequies of the last owner. If you find that he is fully entitled to do so, know it for certain, he says, that he is an heir of the deceased. Yajnavalkya left it in doubt whether, according to him, the son of the daughter should inherit the property of his maternal grand-

He gave the daughter's son his present place among the heirs,

[1] Ch. XVII. Colebrooke's Digest, 577.

Lecture VI.

father. Vishnu coming after him decided, that the daughter's son is an heir. He came to this conclusion by applying the unfailing doctrine of spiritual benefit. "If a man leave neither son, nor son's son, nor other issue, *the daughter's son shall take his wealth.* For in regard to the obsequies of ancestors, daughter's sons are considered as son's sons,"[1] for the male offspring of a son and of a daughter are equally qualified to perform obsequies for their grandfathers. The question was whether "exceptionable sons, as the son of an unmarried damsel, a son of concealed origin, one received with a bride, and a son by a twice-married woman," had any share in the property of their reputed father. They are sons of tainted blood, and have no right to offer the spiritual offerings to the deceased. They must, therefore, be ruthlessly excluded. "They share neither the funeral oblation, nor the estate."[2] Nothing can be clearer than this. The theory of spiritual benefit received its fullest sanction from Vishnu. Whatever doubt may exist as to other legislators, even the most sceptical cannot deny that Vishnu was a staunch supporter of the religious doctrines.

and excluded sons of tainted blood from inheritance.

Vrihaspati following the footsteps of Yajnavalkya and Vishnu, developed to a considerable extent the law of inheritance. What was left obscure by those legislators was made clear as day by this sage.

Vrihaspati carried the development further than Vishnu.

[1] Mitakshara, II, 3, 6.

[2] I, 11, 27.

He professed himself to be a great admirer of Manu. "Manu holds," he says, "the first rank among legislators. No code is approved which contradicts the sense of any law promulgated by Manu."[1] But when the time came to declare his adherence to Manu, and to show *practically* that he was a follower of Manu, he demurred and beat a retreat. Or, perhaps, he was very cautious in his wording when he expressed his admiration for Manu,—"No code is approved which contradicts the *sense* of any law promulgated by Manu." But the *sense* of Manu's language is *incomprehensible*, to say the least of it. No two authors seem to agree as to the right interpretation of Manu's words. Whether Vrihaspati followed the *sense* of Manu, or chalked out a new path for himself, it is quite evident he was bound by the law of development, and promulgated his rules of inheritance in obedience to the law of progress. *The maternal kinsmen* received a distinct recognition in his Code. Yajnavalkya laid the foundation of this, it is true, but he employed the word *bandhu* for maternal relatives, which was liable to misinterpretation. Vrihaspati clears this point in such a manner that it can never again be a subject of controversy. The *maternal* kinsmen succeed immediately after the *paternal* kinsmen, and their right is thus indubitable.

His enumeration of heirs includes maternal kinsmen.

The text declaring in direct terms the right of

He recognizes

[1] 2 Colebrooke's Digest, 437.

LECTURE VI.

father's rights.

the father is missing; but there can be no doubt that the *father* received his just rights at the hands of Vrihaspati. This is evident from the general tenor of his writings, as well as from the text that kinsmen related by the funeral cake divide the inheritance in default of any issue, wife, brother, or *father*, or mother. This text correctly lays down the order in which the succession is to take place.

The doctrine of spiritual benefit upheld by him.

The theory of spiritual benefits also was fully considered and recognized. Whoever might be the heir, it was his first duty to perform those *ceremonies* which would spiritually benefit the deceased, and "half the collected wealth" should be religiously set apart for this purpose. This is an obligation from which the heir can never be set free. He receives the inheritance in right of the benefit which he is competent to confer on the last owner, and should, therefore, on no account fail to perform the rites which would confer eternal bliss on the proprietor to whom he was nearly related, and whose wealth he enjoyed.

His law of succession as applicable to undivided families.

We find also a distinct law regulating succession in undivided families:

"If brothers, who have made a partition, become through mutual affection reunited, and again make a division of their joint property, the first-born has no right to a larger portion.

"Should any of them die, or anyhow seclude

himself from the world, his share shall not be lost, but devolve on his uterine brothers.

"But his sister is next entitled to take the share. This law concerns him who leaves no issue, nor wife, nor father, nor mother.

"That reunited parcener, who singly acquires wealth through learning, valour, and the like, shall take a double share, and the others each a share."

It will be remarked that, except perhaps the provision made for "a double share" in self-acquisitions, there is nothing new in these laws. The same laws, as we have pointed out, had already received the sanction of the older legislators.

Katyayana's rules the same as those of Vrihaspati.

We will not touch upon the laws promulgated by Katyayana. He was a follower of Vrihaspati, from whom he repeatedly makes quotations to support his own views. It is but reasonable, therefore, he would not materially differ from Vrihaspati in his enunciation of the principles of inheritance. The fragments we have got of Katyayana do not give the rules of succession in detail. But so far as they go, however, there is a family resemblance between the laws of the two legislators. Katyayana probably felt some reluctance in admitting the son of a daughter as an heir. The daughter has naturally great affection and sympathy for her father's family. It is but fair that she should have a share of the paternal heritage. But a daughter's son is entirely cut off from the family of his maternal grandfather,

But he has reluctantly admitted the daughter's son as an heir.

LECTURE VI.

and his interests are not identical with theirs. We see that the old and hallowed family-associations were still cherished with affection, and legislators were not easily persuaded to introduce into the family foreign elements which could not easily amalgamate with this corporate body.

Summary. Equality of son's right.

To sum up.—Sons born of a wedded wife succeed *equally* to the property of their father.

The right of primogeniture prevailed to a considerable extent, but it gradually became obsolete; and there was a consensus of opinion that priority of birth did not entitle a person to a larger portion.

Adopted son.

In default of sons of the body, lawfully begotten, *eleven* other classes of substitutes were allowed; and on falure of the former the latter inherited the paternal estate, *in order*. The practice of such filiation, however, has now been abrogated. The only subsidiary sons now recognized are the *adopted* son, the son *made* in Behar and Tirhoot, the son of the wife in Orissa, and perhaps the son of the appointed daughter in some of the provinces of India. With regard to the latter class of sons, the British Courts are extremely reluctant to admit them as heirs. "Even supposing," says the Privy Council, "the old rule of Hindu law still to exist, *viz.*, that a daughter may be specially appointed to raise a son, and that the son of a daughter so appointed is entitled to succeed in preference to more distant

Son made (Behar); wife's son (Orissa).

male relatives, inasmuch as the rule breaks in upon the general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it." We will discuss in a future lecture the question whether sons of appointed daughters are still recognized as heirs.[1]

Heirs *per representationis.*

The right of representation was allowed as far as the great grandson; and the term *issue* comprehended, not only as many sons as a man may chance to leave behind him, but son's sons also, and the sons of the latter or great grandsons.

Son's son and son's grandson.

"To three ancestors," says Manu, "must water be given at their obsequies; for three is the funeral cake ordained; the fourth in descent is the giver of oblations to them; but the fifth has no concern with the gift of the funeral cake."[2] By this right of representation, the grandson and the great grandson, the father of the one and the grandfather of the other being dead, take equal shares with their uncle and granduncle respectively.

In default of sons, grandsons inherit; and on failure of them the great grandsons take the property of the deceased. In both cases they take *per stirpes.* This rule *per stirpes* was laid down by Yajnavalkya,[3] and cannot be explained better than in the words of the Mitakshara: "Although grandsons have by birth a right in the grandfather's estate, equally with sons, still the distri-

They take *per stirpes.*

[1] 23 W. R., P. C., 109. [2] IX, 186. [3] II, 123.

LECTURE VI.

bution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves. The meaning here expressed is this: if unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four, the two receive a single share in right of their father; the other three take one share appertaining to their father; and the remaining four similarly obtain one share due to their father. So, if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively."[1]

We cannot resist here the temptation of giving to you Sir Henry Maine's views on the subject of the rule *per stirpes:* "A preference for division *per stirpes*, a minute care for the preservation of the stocks, is in fact very strong evidence of the growth of a respect for individual interests inside the family distinct from the interests of the family group as a whole. This is why the place given to distribution *per stirpes* shows that a given system of law has undergone development, and it so happens that this place is very large in Hindu law, which is extremely careful of the distinction between stocks,

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[1] Mitakshara, I, 5, 2.

and maintains them through long lines of succession."[1]

Widow.

In default of sons, grandsons, and great grandsons, *the widow* inherited the property of her husband. There is a difference of opinion on this point. In Bengal, the widow inherits whether her late husband was separated from the joint family or *not*. But in other provinces of India the widow succeeds *only* when the husband was separated. In a joint family an *undivided* brother is held to be the next heir, and *not* the widow. We have entered into the subject fully in another place, and need not, therefore, do more than allude to it here.

Daughter.

As with the widow, so with the daughter. In Bengal she succeeds on the death of her father, whether he was separate or *not*, but in other provinces she does so only when her father lived *separate* from the joint family. A distinction is made between different classes of daughters unmarried and married, rich and unprovided, having a son, having *no* son, and likely to have a son. But we will pass them over at present. We will merely refer to the text from Parasara, which we quoted in another place, where he postpones the right of the *married* daughter to that of the maiden daughter.

Daughter's sons, when many in number,

The daughter's sons inherit in default of qualified daughters. "If there be sons of more than one daughter, they take *per capita*, and not *per*

[1] M. E. In., 329.

LECTURE VI.

They take *per capita.*

stirpes," but this is a refinement to which the ancient legislators did not pay any heed. The rule can surely be deduced from the doctrines laid down by them, but such deduction was left by them to their followers, to whom every word of their teachers was sacred. In Bengal the daughter's son takes the heritage, whether his maternal grandfather's property was joint with or separate from that of his coparceners; but in provinces governed by the Mitakshara law, the daughter's son is entitled to the inheritance *only* when the property *is separate*. "Under the Hindu law," says the North-West High Court, "where a property is proved to be a separate and divided property, the daughter's sons are the legal heirs entitled to it, and not more remote relations to the deceased "[1]

Father. Mother.

The *parents* inherit in default of daughters. The father succeeds first, and then the mother. This is the rule in the Bengal school, but in other schools the mother takes precedence.

Brother.

In default of parents, the brothers inherit. A distinction was made between brothers of the whole blood and those of half blood, as well as the associated and unassociated brethren. The former were preferred to the latter. Yajnavalkya lays down the following dictum on this point: "A reunited parcener shall keep the share of his reunited co-heir. An uterine brother shall retain the allot-

[1] N. W. P., H. C., Vol. II, 166.

ment of his uterine relation. A half brother, being again associated, may take the succession, not a halfbrother who is not so reunited; but one united (united by blood, though not by co-parceny) may obtain the property; and not *exclusively* the son of a different mother."[1]

LECTURE VI.

Brother's son.

In default of brothers, their sons inherit in the same order.

Paternal and maternal kinsmen.

On failure of them other paternal kinsmen inherited the property; and if there were none, maternal kinsmen shared the heritage.

Preceptor, pupil, fellow-student, and lastly the king.

In default of all of them, the preceptor, the pupil, the fellow-student, and lastly the king obtained the estate of a person dying without issue; so that the obsequial rites in the language of Manu, "might never fail."

Grandmother's position discussed.

It should also be stated here that the grandmother was recognized as an heiress. But considerable difficulty was experienced in determining the exact position she should occupy as the heiress of her grandson. Well, by the time her grandson departed this life in ripe age, she had not many days to number. Manu said she might come in after the mother, Katyayana placed her after the brother. She soon vacated her place, and legislators did not, therefore, trouble themselves much about her rights and her position in the table of succession.

Theory of spiritual benefit.

At this stage of our subject, we feel justified in

[1] Yajnavalkya, II, 139, 140.

LECTURE VI.

In the medieval period of Hindu law.

making the statement that the theory of spiritual benefits was universally recognized in the medieval period of Hindu law. "He with whom rests the right of performing obsequies is entitled to preference in the order of succession." If the principle be stated in such general and indefinite terms, it is certainly liable to grave objection. It requires for practical purposes important limitation and extension. But it cannot be gainsaid that the medieval *Rishis* were fully alive to the fact that the right of inheritance was based on the right of conferring, *directly* or *indirectly*, spiritual benefits on the deceased. We have said that even the inspired sages of the Vedic period were anxious that in regulating succession arrangements should be made that religious ceremonies, conducive to the spiritual welfare of the deceased, should be performed by the *heir* who received the property. The language of the medieval legislators on this point is clear and consistent: "Those who are allied by the funeral cake," says Gautama, should take the wealth of the deceased. "He who takes the property of the deceased," says Vishnu, "is bound to present a funeral cake to him." It must not be supposed, he continues, that the property is given to a person simply to *tempt* him to present these offerings. The presentation of these oblations is an act of duty of the kinsman who receives the property; and if there were no property in question, he is still bound to

perform that duty. The case of the son is a case in point. "He must give the *pinda*, even if he does not get any property from his father." The successor is bound to the due performance of the obsequial rites for the person whose wealth has devolved on him; but if the deceased left no property, his near kinsmen were bound nevertheless to perform this act of duty. This is tantamount to saying that the presentation of the necessary oblations was the imperative duty of all the near relations, and it must be performed irrespective of any considerations of inheritance of property. Why were the medieval *Rishis* so very anxious to lay down rules for giving *pindas* to the deceased, when legislating for the proper distribution of the effects of the deceased proprietor? There is scarcely one of them who does not couple the *pinda* and the *daya*—funeral cake and the inheritance—together. Where was the necessity for their doing so, unless they wished that these two should be bound together. He who takes the latter must do the former—if you take the property you must perform acts which would spiritually benefit the last owner.

Performance of spiritual rites obligatory on the nearest relations.

Necessity for connecting inheritance with *pinda*.

We do not mean to say that the principle was cut and dry, and was in its full developed form, from the earliest times. The early sages saw it dimly, but its gradual growth is unmistakable to a student of the medieval history of Hindu law. The proposition that he who takes the inheritance must

LECTURE VI.

give the funeral cake was easily laid down, but considerable hesitation is perceptible in laying down the converse proposition, that he alone, among the near kinsmen, who is competent to give the *pinda* is entitled to the inheritance. The gift of the *pinda*, and nearness of kin or proximity of birth, were the joint considerations which swayed the medieval *Rishis* in framing the principles of succession. The clearest proof of the existence of the principle of spiritual benefit as the regulating power which guided succession is in the fact that even those legislators who were most sceptical on this point applied this unfailing principle whenever any difficult problem, in matters of succession, was presented to them for solution. We will cite Yajnavalkya as an example.

Doctrine made applicable to cases of disputed succession.

The question was whether the son of a wife, begotten by a kinsman, should be considered as a successor to the estate of the husband of the wife, as well as to that of his natural father. "Yes," says the sage, "he is the lawful heir, *because* he is the giver of oblations to both fathers."[1] The general question was mooted whether the subsidiary sons should receive legal sanction as *heirs*. There cannot be a question about it. He says,—"Among these the next in order is heir, *because* (*cha*) they present funeral oblations on failure of the preceding."

That the particle *cha* (and) is intended to bind the two clauses as a cause and an effect, cannot, we

[1] II, 130.

LECTURE VI.

are bold to think, be denied by any reflecting student of Yajnavalkya. It is needless to pursue the subject any further. There can be no question that in the medieval period of Hindu law at least, the principle of spiritual benefit was *widely*, if not universally, recognized. Armed with the texts we have cited, and others which we have kept in reserve,[1] we feel justified in repudiating the gratuitous assumption that the theory of spiritual benefits was a myth in Hindu law, and a figment of the Brahmanic brain in Bengal.

The doctrine is not a later innovation on the part of Bengal Brahmins.

We have attempted to show that the medieval legislators, on whose teachings the doctrines of the modern schools of Hindu law are based, recognised the principle that the right of inheritance is wholly regulated with reference to the spiritual benefits to be conferred, directly or indirectly, on the deceased proprietor. We will in a future lecture examine the statements put forward that, "In Bengal the inheritance follows the duty of offering sacrifices. Elsewhere the duty follows the inheritance."[2]

But is traceable to medieval legislators.

[1] Colebrooke's Digest, Vol. II.; Devala, 243, 320; Vriddha Manu, 535; Manu, 328, 339, 350, 417, 479, 564; Yajnavalkya, 332, 363, 408, 421; Yama, 333; Sankha, 335, 338, 385, 420, 423; Apastamba, 335; Vas'ishtha, 337, 387; Baudhayana, 362; Harita, 363; Narada, 365, 442; Vrihaspati, 380, 420, 424, 522, 569, 576; Vishnu, 548, 577; Gautama, 570; Sátátapa, 609, 626.

[2] Mayne's Hindu Law, 9.

LECTURE VII.

THE MODERN SCHOOLS OF HINDU LAW.

Conflict of legal dogmas during middle ages — Gave rise to commentaries — Infallibility of the sages — Considered as basis of the Hindu religion — Difficulty of reducing the doctrine to practice — Need of its solution — Without any radical change or innovations against which public opinion arrayed itself — Supplied by Medhatithi's commentary on Manu — Difficult points of Manu left untouched by him; *e.g.*, the real import of the phrase "nearest Sapinda" — Medhatithi's opinion on disputed points held conclusive — His chronological age — Antecedent to that of Vijnanesvara — The value of his commentary — His successors, commentators of the eleventh century — Bisvarupa — His voluminous work condensed and methodized by his pupil Vijnanesvara — Dharesvara — His supposed identity with Bhoja Raja — His doctrine refuted by Visvarupa and Vijnanesvara — His age the same as that of Bhojadeva — Middle of the eleventh century — Srikara — Origin of the different schools of Hindu Law traced — Custom superseding written law — Growth of independent States — An attempt at harmonising the written with the unwritten laws — View of the subject by the Privy Council — Expressed in its decision as to the widow's right to adopt — Remarks by H. S. Maine — Commentaries and digests practically form the source of the current rules of law — English Lawyers' estimate of what these are — Distinction between the various schools of law partly due to preference for particular works — Erroneous view that the law of each school is only to be found in the works exclusively belonging to it — Is the division of Hindu law into schools a myth or invention? — The latter question answered in the affirmative — Was Hindu law itself ever existent? — Elphinstone quoted in support — Import of the term "law" as it governed different principalities in India — Dr. Burnell's theory of the probable non-existence of the schools of Hindu law controverted — The English word "school" has its counterpart in the original Sanskrit works — "Sampradaya" — Resemblance between the laws of different schools — Which are all based upon the same general principles — Variations how effected — Integral character of Hindu law — Relation between the approved treatises on law of different schools — How is it possible to dive into the fundamental principles — How to study the subject.

LECTURE VII.

Conflict of legal dogmas during middle ages.

THE last lecture must have prepared you for the assertion that the law of inheritance had arrived during the middle ages at a stage of development in which it was absolutely necessary to harmonize the conflicting dicta of the medieval legislators, all of whom were considered as independent authorities on disputed points of law. It was indispensable that the scattered law of the country should be codified, and that an authoritative explanation should be offered of the real or apparent contradictions which were constantly met with in approved legal treatises bearing the name of sages, whose word was law to the whole Hindu community. Manu and Yajnavalkya, Baudhayana and Vas´ishtha were infallible guides in all matters, whether temporal or spiritual, legal or ceremonial; and he who ever dared to question their authority would be considered guilty of rank heresy, and would be denounced as an apostate from the "eternal faith." The inspired sages could never contradict each other; it was the defective understanding of inferior men which could not discern the real significance of their oracular sayings. The fault lies not with the lawgivers, but with their interpreters. If the dicta of the medieval legislators could be correctly interpreted, the law of inheritance as propounded by them would be found, it was thought, to be consistent in every point. Commentators were needed, who would enter into the spirit of the laws, and who, in explaining the writings of the sages, would show the true bearings of the laws, and

Gave rise to commentaries.

LECTURE VII.

thus reconcile the apparently contradictory statements of the founders of Hindu law.

Infallibility of the sages.

Opinion might be divided as to the truth of the assertion that the sages could never err ; but it could admit of no question that the circumstances of the country had changed, and required a different body of laws. There was a consensus of opinion that the original laws should, in many instances, be modified, extended, or totally altered. But the doctrine of the infallibility of the *rishis* held paramount sway, and no one was bold enough to impugn their authority. The penalty consequent upon dissenting from the inspired writings was nothing more nor less than expulsion from the pale of Hindu society. The dread of the anathemas of the Hindu priesthood might well deter the boldest from offending them. If you once question the infallibility of the sages, the foundation of the Hindu religion would be sapped ; and it was no wonder, therefore, that the natural guardians of that religion protected with such zealous care the sacred treasures solemnly entrusted to them by countless generations of pious Hindus.

Considered as basis of the Hindu religion.

Difficulty of reducing the doctrine to practice.

The law of the country, meanwhile, was in a state of anarchy. Adjudication was impossible. Where all the authorities were of equal importance, preference shown to one would be to underrate the importance of the others. A remedy was loudly called for, and a remedy was found at last. The easiest course would have been to repeal the old laws, and to

Need of its solution.

Without any radical change or innovations against which public opinion arrayed itself.

enact new laws better adapted to the progressive changes which advancing civilization had introduced into the country. But public opinion was against any such novel procedure. The old fabric must be retained. It might be repaired and altered, but the foundation must remain as it was. The task was difficult, but there was no alternative.

Supplied by Medhatithi's commentary on Manu.

Medhatithi grappled with the difficulty resolutely and courageously. He paid due deference to ancient authorities, but hit upon a course which was adapted to present requirements. He wrote a commentary on *Manu*. "Manu," says Vrihaspati, "held the first rank among legislators, because he had expressed in his Code the whole sense of the Veda; no code was approved which contradicted Manu; other Sastras, and treatises on grammar and logic, retained splendour so long only as Manu, who taught the way to just wealth, to virtue, and to final happiness, was not seen to be in competition with them."

It was wise, therefore, of Medhatithi to fix upon Manu as *the* lawgiver whose words would command respect, and silence every dissentient voice. There might have been others before him who followed the same plan of explanation and exposition of the ancient texts in accordance with the spirit of the age in which they lived. But history does not record their names, and even where the names have been preserved, the shadow alone remains, the substance has disappeared. The treatises given by them to the

Lecture VII.

world have been irrevocably lost, and we have no means of judging of the intrinsic value of their opinions, compared with those of Medhatithi and his successors. This jurisconsult was not satisfied with the work of a mere expositor; he found new meaning in words which had hitherto escaped the ken of other practised lawyers. Manu was certainly the basis of Medhatithi's law; but the great commentator knew how to read between the lines, and he gave such an explanation of Manu's texts, that the inspired law-giver, had he risen again from the dead, would have had great difficulty in recognising them as his own. The outward form of the texts certainly remained as they had come from the mouth of Manu, but the old spirit had fled and a new one had taken its place, and assumed the outward garb which it had forsaken. Father Manu must retire, and make room for new comers. Medhatithi advanced opinions, and laid down rules which would satisfy the requirements of his times. But he still clung to the cloak of his great author, and lived under his shadow. It sometimes happened that Medatithi was obliged to enunciate principles which no amount of squeezing of Manu's texts would be able to yield. In such cases, the commentator resorted to other authorities to support his views. His individual opinion went for nothing; he must show that his opinions had the sanction of the medieval legislators. The commentary of Medhatithi bristles with quotations from re-

cognized authorities, and these quotations were often apposite, but sometimes misapplied. For a long time Medhatithi's commentary on Manu was considered as a paramount authority, and gave law to the Hindus. But others followed in his track, and improved upon his plan. Medhatithi was considered prolix and unequal to the task before him. He dwelt at length upon points which were clear as daylight, and often left untouched points which required elucidation. We will give one instance: "To the nearest *Sapinda*," says Manu, "the inheritance next belongs."[1] I pointed out to you in a previous lecture that this text is very ambiguous. Almost any conclusion could be founded upon it. It has become the subject of contention in all the schools of Hindu law. "Nearness referred to by Manu," say one class of teachers, "means nearness of *blood*." Propinquity alone, according to them, should regulate succession. "Absurd," say rival teachers. "Nothing could be further from Manu's intention than this interpretation put upon his text. Consanguinity can never form the test of the right of inheritance. The real drift of Manu's text is, that the order of succession is regulated by the degree in which benefits are conferred." Granting that the former teachers are right in their interpretation, the next question that can fairly arise is, "What is the test then by which the degree of propinquity is to be determined?" Various

Difficult points of Manu left untouched by him; *e.g.*, the real import of the phrase "nearest Sapinda."

[1] IX, 187.

LECTURE VII.

answers are given, but none of them have been deemed quite satisfactory. This is an open question even now, and it is as far from being satisfactorily settled now as in the days of Vijnanesvara and Jimutavahana.

We turn to Medhatithi for an answer. His commentary is the oldest of all the Digests of which we have any remnant left. We strain our eyes in vain to find out Medhatithi's explanation of the disputed text. The great commentator evidently thought it not worth his while to touch upon this point. He has *not* explained the text at all. We turn away disappointed, and plunge into the midst of the controversies that have been raised in the various schools of law. All the eminent teachers wrangle about the true meaning of the text, and we are perplexed by their endless disputations. We are lost in an interminable labyrinth ; and are unable to extricate ourselves from the bewildering difficulty in which we are involved.

Medhatithi's opinion on disputed points held conclusive.

All that we know about the life and history of Medhatithi is that he was the son of *Bhatta Birasvami.* Portions of his great work were lost, and were recast and rehabilitated at the court of Madanapala, a prince of the Jat race, who reigned at Kashthanagara on the banks of Jamuna, at the end of the twelfth century. Vijnanesvara quotes[1] Medhatithi in the Mitakshara. The latter must, therefore, have preceded Vijnanesvara. The author of the Mitak-

[1] I, 7, 13.

shara pays a high compliment to the worth of Medhatithi, "who," he says, "is without a compeer;" and is extremely anxious to show that his great predecessor is seldom wrong in his interpretation of the texts of the medieval sages, "The interpretation of Medhatithi," we hear him exclaim, "is square and accurate." The exposition of the texts of Manu, given by Medhatithi, is at least authoritative, and the explanation of no other commentator can stand in competition with that given by him. The appeal to Medhatithi in all disputed points, wherever the right meaning of Manu's texts is concerned, is conclusive, and neither Vijnanesvara nor Jimutavahana would be heard in opposition to the oldest commentator of Manu.

LECTURE VII.

His chronological age.

As regards the age of Medhatithi, it is not safe to fix upon a precise date. Medhatithi quotes Kumarila, the predecessor of Sánkara, who lived probably in the seventh and eighth century of the Christian era. This much is certain that he flourished before the eleventh century of the Christian era. Vijnanesvara, as we will show further on, flourished at the end of the eleventh century; and as the author of the Mitakshara quotes from Medhatithi with approbation, the latter must have preceded the former by at least a hundred years. Wherever Medhatithi is mentioned he is named with respect. In a conservative country like India, novel ideas and principles, and modern authors and their productions, are looked

LECTURE VII.

upon with distrust, and seldom elicit respect from contemporary teachers. If they are noticed at all, they are noticed with a view to refute their doctrines. Even then their *names* are scarcely mentioned ; the doctrines alone are glanced at, and often severely handled. "Some say," "It is the opinion of some:" in this way only contemporary authors and their opinions are mentioned, and treated with scant respect. When a body of doctrines is mellowed by age, and adopted and followed and tested by the experience of at least three successive generations, then it is that their teacher is recognised as a law-giver "without a compeer ;" and succeeding teachers become ambitious of following in his footsteps. Medhatithi, therefore, must have preceded Vijnanesvara by at least three generations. Nor is it probable that the interval between the two teachers could have been covered by more than one hundred years. Had more than three generations intervened between them, we would have heard of the names of many other authors mentioned with esteem. Vijnanesvara is very anxious to support his doctrines by the well-known authority of other eminent teachers ; and if in any case he differed from others, he cites them by name, and then refutes their doctrines and tries to establish his own. Many such teachers are not cited by him either in support or in opposition to the principles which are sanctioned by him. Like a true lawyer, Vijnanesvara always went by precedents, and settled

Antecedent to that of Vijnanesvara.

every disputed question by citing the authoritative opinions of his predecessors. Had there been any other than Medhatithi, whose opinion was entitled to respect, his authority would certainly have been quoted with approbation. Nor is it likely that at a time in the history of India, when literary activity was carried to its greatest extent, there was no other eminent teacher except Medhatithi during a period embracing more than a hundred years. From the tenth to the end of the seventeenth century, constant additions were made to the legal literature of the Hindus; but before the tenth century we have not heard of a single eminent jurist making a figure in the republic of letters, as a commentator or text-writer. The reason probably is, that from the beginning of the Christian era to the end of the ninth century, the medieval lawgivers, Manu, Yajnavalkya, and their coadjutors and followers were busily employed in collecting and adapting and versifying the scattered law of a former generation, and the necessity for a regular digest, like that of Medhatithi, in which the contradictions and the conflicting opinions of the inspired sages are sought to be reconciled, was not deeply felt. The laws must be made and crystallised before they can be digested and commented upon.

The value of his commentary.

Be that as it may, it can be safely said that Medhatithi was one of the first, if not *the* first, commentator whose work survives, and is still reckoned as

LECTURE VII.

one of the pre-eminent authorities in all questions relating to inheritance. The prolixity of the commentator, and his antiquated forms of expression detract very much from the value of his work. We often also deplore his reticence, and hesitate to apply his principles in interpreting the law of the present age. But his opinions are entitled to the highest esteem, and his interpretation of the law of the country before the age of Vijnanesvara is invaluable. Whenever we are in doubt as to the true intent of a text of Mitakshara, we have only to refer to Medhatithi, and to see what was the state of the law in question before the time of the author of the Mitakshara. If we could get the works of Srikara, Dharesvara, and above all that of Visvarupa, all the obscure points in the Mitakshara law would be cleared up, and the present age would not have been obliged to grope in the dark, and hazard opinions and enunciate principles, not in accordance with the spirit of Vijnanesvara, but often in direct antagonism to him. In absence of the works of the immediate predecessors of the founder of the Benares school, the commentary of Medhatithi is of the utmost value in pouring a flood of light on all the obscure portions of the Mitakshara law. Kulluka Bhatta's commentary on Manu—which was pronounced by Sir William Jones "as the shortest, yet the most luminous, the least ostentatious, yet the most learned, the deepest, yet the most agreeable, commentary ever composed

by any author ancient, or modern, European or Asiatic"—has in a great measure superseded the more ancient work of Medhatithi. But as a record of the laws and customs of a generation preceding the age of Mitakshara, and as a work of far-reaching genius, which first taught the Hindu community how to reconcile order with progress, and to assimilate the principles and ideas, laws and usages, necessitated by advancing civilisation, with those which were sanctioned by the hoaryheaded veterans of a former generation, the commentary of Medhatithi will stand as a monument of Brahmanic wisdom unrivalled in any age or country. The process of destruction is an easy task; but he who can construct without destroying, and can harmonize order with progress, is deserving of the lasting gratitude of humanity. As a commentator and a jurisconsult the fame of Medhatithi will last, to use an oriental metaphor, as long as the sun and the moon irradiate the sky.

His successors—commentators of the 11th century.

The work of reconstruction thus fairly begun went on apace. Medhatithi was soon followed by *Srikara Dharesvara*, *Bisvarupa*, and Vijnanesvara. All these authors belong to the eleventh century. The first three are quoted by Vijnanesvara.[1] This helps us to ascertain the age in which they promulgated their laws. Bisvarupa is mentioned by Vijnanesvara as *acharya*, or venerable preceptor. It was

Bishwarupa.

[1] Srikara, II, 1, 31; Dhareshwara, II, 1, 8; Visvarupa, Book I, 1.

LECTURE VII.

from him that the author of the Mitakshara received instructions in the science of law. His opinions are always cited with approbation. Bisvarupa is once only mentioned by name; he is oftener cited as "the holy teacher." In several places we find that the opinions of Bisvarupa are referred to with profound respect. In discussing many disputed questions he thus defers to Visvarupa's authority: "Even that opinion the reverend teacher does not tolerate;"[1] "the holy teacher does not assent to that doctrine."[2] Now in India the immediate teacher alone is honored with the title of "venerable preceptor," "the reverend teacher," and "the holy teacher." Visvarupa, like his distinguished pupil, was a scholiast of Yajnavalkya. In the introduction to his work, Vijnanesvara, referring to the commentary of his teacher, says: "The Code of Yajnavalkya, which has been explained by Visvarupa, in language hard and diffused, is now abridged by me in such a simple and concise style that it may be easily comprehended even by children." It would appear from this that Vijnanesvara drew his inspiration from Visvarupa; that the latter wrote a voluminous work on the law of Yajnavalkya; that the language of Visvarupa was dry and harsh; but that his treatise contained a fund of most valuable ideas, though they were unshaped, unarranged, and expressed in a most diffuse way. Vijnanesvara discovered the value of

His voluminous work con-

[1] II, 1, 35. [2] II, 4. 3.

this hidden treasure, and became anxious to publish to the world the thoughts and ideas of his "reverend teacher." He undertook the task of another Etienne Dumont to another Jeremy Bentham, and arranged, condensed, filled out, and translated into easy Sanskrit the learned and extensive work of Visvarupa. The very name of "Mitakshara"—a treatise of measured words—would seem to imply that it was an abridgment of Visvarupa's voluminous work. If we could, therefore, lay our hands on the commentary of the teacher, and compare it with that of his disciple, the Mitakshara Law of Inheritance would become clear as day, and the now obscure texts of Vijnanesvara would no longer bewilder and perplex the jurists of the present day. But hitherto our search for Visvarupa's commentary has proved unsuccessful, and there is no knowing whether this valuable commentary will ever come to light. We are informed that there is a copy of this work in the library of the Maharaja of Cochin.[1] Whoever may be the fortunate man to first open the commentary of Visvarupa, will lay students of Hindu law under great obligations.

LECTURE VII.

—densed and methodized by his pupil Vijnanesvara.

As regards Dharesvara, there cannot be the shadow of a doubt that he preceded Visvarupa. The latter cites the former by name, and refutes his doctrines.[2] Now the question is, who was this Dharesvara. As a proper name the word is uncommon. Etymo-

Dharesvara.

His supposed identity with Bhoja Raja.

[1] Oppert's Sans. MSS., Southern India, 3010.
[2] Smriti Chandrika, Cal. Sans. Ed. p. 68.

Lecture VII.

logically, it means the "sovereign of Dhara." Dhárá was the capital of Raja Bhoja, who flourished in the eleventh century. It is quite possible, says Colebrooke, that Dharesvara was the same with the celebrated Raja Bhoja, "whose title may not improbably have been given to a work composed by his command, according to a practice which is by no means uncommon." This supposition derives additional strength from the fact that the name of *Bhojadeva* is also quoted as a celebrated lawyer.[1] The king of Dhara was a renowned patron of literary men, and it is no matter of wonder that the works composed during his reign were dedicated to him, and honored by his name. The rules laid down by Dharesvara were accepted as laws in the kingdom of Bhoja, and like the Statutes of the British Parliament, went by the name of the reigning prince. The manner in which Dharesvara's opinions are discussed by rival jurists also lends support to this view.

His doctrine refuted by Vishwarupa and Vijnanesvara.

Vijnanesvara does not refer to him as an ancient authority. He is quoted as a contemporary whose "erroneous" opinions it was necessary to refute. The doctrines of Dharesvara had evidently attained a wide celebrity, and Visvarupa and his disciple felt it incumbent upon themselves to offer a strong opposition to them. The doctrines which they advocated would not have had the least chance of being established, unless those of Dharesvara had been

[1] Dayabhaga, XI, 2, 22.

successfully refuted. Hence we find Vijnanesvara devoting a larger space to the refutation of Dharesvara's doctrines and arguments than to those of any other jurist.[1]

LECTURE VII.

Dharesvara Suri and Vijnanesvara *pandita* were, besides, patronised by the sovereigns of two rival States, Dhara and Kalyana. Vijnanesvara felt morally bound, therefore, to maintain his own credit and that of his patron and king, by giving a lengthened refutation to the arguments of Dharesvara Suri, the legislative member of Bhojadeva's council.

His age the same as that of Bhojadeva.

If we can ascertain, therefore, the age of Bhojadeva, that of Dharesvara will be easily found. Lassen, after a careful examination of ancient inscriptions, places the reign of Bhoja between 997—1053. There are reasons, however, for placing his reign a little earlier. Bilhana, the author of Vikramarkacharita, whose date has been ascertained to be "the eighth decade of the eleventh century"[2] thus speaks of Raja Bhoja in his Life of Vikramarka: "Simulating the cooing of the pigeons that nestled on the lofty turrets of her gates, Dhara thus cried to him (the poet) in pitiful accents: 'King Bhoja is a mighty sovereign. He is not like other vulgar princes. Why did you not come to his court. Alas! alas! woe is me!' Here the poet insinuates that he could have easily, if he wished, come to Dhara, and become an honored guest at his court. But

[1] II, 1, 8—14.

[2] Vikrama Charita, Intro., p. 20.

LECTURE VII.

unavoidable circumstances prevented him from paying a visit to the great patron of letters of that time. A well known work called Rajamriganka is dated 1043."[1] By combining these two facts, and having regard to the information gathered from the authentic inscriptions of his time, the conclusion is irresistible that Dharesvara flourished in the middle of the eleventh century.

Middle of the eleventh century.

Srikara.

There now only remains Srikara to be disposed of. Srikara must have promulgated his treatise before either Dharesvara or Visvarupa. His opinions were handled severely both by his contemporaries, as well as by the jurists of a later generation. Vijnanesvara does not cite him as a very ancient authority. But he displays no rancour against him. He simply refutes his opinions as erroneous theories. Srikara is mentioned only once or twice by Vijnanesvara. Had he been a contemporary whose doctrines were universally accepted, Vijnanesvara would have felt himself bound to oppose them with all his might. Srikara, therefore, was neither a very ancient authority, nor was he contemporary with Vijnanesvara, and we have seen that the distance of time between Dharesvara and the author of the Mitakshara is not very great. We have no other alternative, therefore, but to place Srikara between Medhatithi and Dharesvara.

Origin of the different schools

Before the time of Srikara, Hindu Law was not

[1] Buhler's Introd., Vikrama Charita, p. 23.

divided into different schools. All the eminent jurists, lawgivers, and juriconsults were equally honored in all the provinces of India. The novel theories of Srikara set the minds of men thinking. Srikara is a Mithila authority, and his treatise must have enjoyed a very wide celebrity. We read that "Srikara and others *swelled* their treatises by dwelling at length on the subject of 'deductions, &c.,' under the impression that the rule about them is still sanctioned in the present age by the usage of the Great."[1] It would seem from this as well as other similar expressions that Srikara was a voluminous writer who classified and condensed the doctrines promulgated by the jurists before him, and adapted them to the circumstances of the province in which he lived. In the eleventh century great changes were being effected in all parts of India. Although the Mahomedan conquerors from across the Hindukush had not yet established their supremacy in the country, foreign ideas were being introduced, and the bonds which formerly united the whole Hindu community were greatly loosened. The repeated invasions of Mahmood of Ghizni and his iconoclastic acts must have taught the people that the age of *authority*, hemmed in by time-honored traditions, and hallowed by sacred associations, was passing away, and that a new order of things was being introduced into Hindustan. Mithila had, for a long time, from the age of Yajna-

LECTURE VII.

of Hindu Law traced.

[1] Smriti Chandrika, Calc. Ed., p. 20.

LECTURE VII.

valkya, been the centre from which emanated the laws which governed the whole Hindu world. The doctrines promulgated by the jurists of Mithila were universally accepted, and were never challenged. These laws, however, were not often adapted to the circumstances of other parts of the country, and were often found unsuited to the administration of justice. A body of *unwritten* laws was being formed, which, in many instances, superseded the written and the authoritative laws of Mithila. "*Locachara*" and "Síshtachara," the customs of the people and the usages of the great, were superseding the ancient law. We find even the medieval sages proclaiming in stentorian voice that "the rule of law, which is abhorred by the people, though it may have been sanctioned by sacred ordinances, is not binding, because its observance can never lead us to the attainment of heavenly bliss."[1] That "custom" is an independent source of law, and, where it is universally adopted, it should supersede the provisions of written law; that "under the Hindu system of law, clear proof of usage will outweigh the written text of the law"[2] was theoretically recognised long before the introduction of trans-Himalayan ideas and usages into the country. But after the accession of these ideas, and the disturbance naturally caused by political

Custom superseding written law.

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[1] अस्वर्ग्यं लोकविद्विष्टं धर्म्ममप्याचरेन्नतु ॥

[2] Sutherland's Privy Council Judgments, Vol. II, 140.

changes, the *unwritten* law of the country developed into a new form, and claimed a co-ordinate rank with the authoritative law of the ancients.

Lecture VII.

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Growth of independent States.

In the eleventh century the country was formed into powerful and independent States. The powerful kingdoms of Mithila, in Northern India, and those of Dhara, Kalyana, Kanchi, and Kankana in the Southern Peninsula, were enjoying independence. There was rivalry between the different States, and there was great reluctance to accept the laws imposed by foreign States. The customs and usages of each State had an independent existence of their own, and were for a long time recognised as of superior force to the medieval laws. Why should not these customs and usages, it was naturally asked, be embodied into a code, and acknowledged by sovereign authority? The conservative spirit of Hinduism would not brook the idea of levelling down all the ancient authorities and building on an entirely new fabric. The fiction of *deducing* the customary law from the written law was resorted to, and the result was that the legislators of each State put such an interpretation upon the ancient ordinances as would be conformable to the public opinion of the provinces in which they promulgated their laws. They dared not enact laws which would be repulsive to established usages, and they ventured not to frame rules which could not be sanctioned by the medieval legislators.

LECTURE VII.

An attempt at harmonizing the written with the unwritten laws.

The task set before them was to harmonize the *written* with the *unwritten* laws of the country, and to support all their new doctrines, necessitated by the growing wants of the people, by quotations from ancient authorities. This was not an easy task. It required vast erudition, thorough knowledge of the thoughts, feelings, and wants of the people, and great skill and power of language to put the new doctrines before the public in such a form that no material difference, at least in their outward features, might be easily discovered. This was the origin of the different schools of law, and to this day Hindu Law is still divided into five branches, following independent courses of their own.

View of the subject by the Privy Council.

It will not be out of place here to quote the following remarks of the Privy Council on the course of development of Hindu Law in the different schools. The Privy Council was considering the power of a childless Hindu widow to adopt a son to her husband with or without his permission under the various schools of Hindu Law.

"The remoter sources of the Hindu Law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally, or very generally received, became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one, and rejected in another,

part of India, schools with conflicting doctrines arose. Thus the Mitakshara, which is universally accepted by all the schools except that of Bengal as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Dayabhaga in those points where they differ, was a commentary on the Institutes of Yajnavalkaya, and the Dayabhaga, which, wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yajnavalkya. In like manner, there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that treatise but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the schools accept as authoritative the text of Vas'ishtha, which says :—' Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the *dattaka* form at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death ; while the Mayukha and the Kaustubha treatises which govern

Expressed in its decision as to the widow's right to adopt.

LECTURE VII.

the Marhatta school, explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband than to the authority to adopt being independent of the husband."[1]

Remarks by H. S. Maine.

The author of "Ancient Law" has also some very apposite remarks on the same subject, and we make no apology for making room for them here. Speaking of the fact that until education began to cause the natives of India to absorb Western ideas for themselves, the influence of the English rather retarded than hastened the mental development of the race, he says:—"There are several departments of thought in which a slow modification of primitive notions and consequent alteration of practice may be seen to have been proceeding before we entered the country; but the signs of such a change are exceptionally clear in jurisprudence, so far, that is to say, as Hindu Jurisprudence has been codified. Hindu Law is theoretically contained in Manu, but it is practically collected from the writings of the jurists who have commented on him and one another. I need scarcely say that the mode of developing law, which consists

[1] Sutherland's Privy Council Judgments, Vol. II, p. 140.

in the successive comments of juriconsult upon juriconsult, has played a very important part in legal history. The middle and later Roman law owes to it much more than to the imperial constitutions; a great part of the Canon law has been created by it; and though it has been a good deal checked of late years by the increased activity of formal legislatures, it is still the principal agency in extending and modifying the law of continental countries. It is worth observing that it is on the whole a liberalising process. Even so obstinate a subject-matter as Hindu law was visibly changed by it for the better. No doubt, the dominant object of each successive Hindu commentator is to continue each rule of civil law so as to make it appear that there is some sacerdotal reason for it, but subject to this controlling aim, each of them leaves in the law, after he has explained it, a stronger dose of common sense, and a larger element of equity and reasonableness than he found in it as it came from the hands of his predecessors."

"Why is it," asks Sir Henry Maine, "that the English mode of developing law by decided cases tends less to improve and liberalize it than the interpretation of written law by successive commentators? Of the fact there seems no question. Even where the original written law is historically as near to us as are the French Codes, its development by text-writers is on the whole more rapid than that of English law by decided cases. The absence of any dis-

LECTURE VII.

tinct check on the commentator and the natural limitations on the precision of language are among the causes of the liberty he enjoys; so also is the power which he exercises of dealing continuously with a whole branch of law; and so too are the facilities for taking his own course afforded him by inconsistencies between the dicta of his predecessors —inconsistencies which are so glaring in the case of the Hindu lawyers, that they were long ago distributed into separate schools of juridical doctrine."[1]

Commentaries and digests practically form the source of the current rules of law.

These long extracts, which I have given, will convey to you a fair idea of the opinion entertained by British jurists on the course of development of Hindu law. It is quite true that commentaries and digests are now considered to be the great source from which the rules of law are practically derived. Manu and Yajnavalkya are cast into the shade, and Vijnanesvara and Jimutavahana have come to the front. But the primary sources of Hindu Law are still held in great esteem, and the authority of the medieval legislators is unquestionable. The commentators simply profess to expound their meaning, and reconcile the contradictory texts on any given subject. It would seem from the remarks of Sir Henry Maine, as well as of the Privy Council, as if the commentaries and the digests referred to by them were the products of arbitrary authority; as if the commentators and the text-writers had created the present law of the

English Lawyers' estimate of what these are.

[1] Maine's Village Communities, p. 50.

country within seven walls in the seclusion of their own chambers. It would seem as if the Hindu law of the present day were the creature of the Brahmanic brain evolved from its inner consciousness rather than from the condition of society then existing.

LECTURE VII.

Distinction between the various schools of law partly due to preference for particular works.

It is the prevailing opinion of British jurists that the main distinction between most of the schools is rather a preference shown by each respectively for some particular work as their authority of law, than any real or important difference of doctrine.[1] This statement is only partly true. Preference is certainly shown in the different schools for some particular work whose authority overrides the authority of other standard works. But the statement that the law of a particular school is only to be found in the works which exclusively belong to it is far from correct. In the first place, it is difficult to lay down categorically that *these* works and no other are held as authorities in a particular school. We know of no work which is the exclusive property of any school whatever. The Mitakshara, as the Privy Council justly say, is of very high authority even in Bengal, where the Dayabhaga, it is thought, holds supreme sway. The real points of difference, as regards the peculiar doctrines of each school, are so few that scholars have been led to suppose that the division of Hindu law into different schools is purely a myth, and

Erroneous view that the law of each school is only to be found in the works exclusively belonging to it.

Is the division of Hindu law into schools a myth or invention?

[1] Morley's Digest, Intro.

LECTURE VII. that no such division is ever recognised by the Hindu lawyers.[1]

These scholars have fallen into an error of an opposite kind, and their view of the province of Hindu law is as reprehensible as that of those who maintain that each school of law must stand by itself, and is quite independent of, and often antagonistic to, the other schools. Mr. Nelson observes that "the extraordinary doctrine of *Schools of Hindu Law* seems to have been invented by English lawyers in very early times, unhesitatingly accepted by Sir Thomas Strange, and received from him without question, and judicially recognised, by the Madras High Court." We are not surprised at Mr. Nelson making such an extraordinary statement. Those to whom the original treatises of Hindu law are not accessible, and who derive their knowledge of the subject from a few imperfect translations, are liable to misconceptions regarding the province of Hindu law, and its natural divisions. Any one who is ambitious to speak with authority on Hindu law must take the trouble to qualify himself for doing so. The chief qualification for this task without which all others are useless, is a knowledge of Sanskrit. However capable a man may be as a critic and reasoner, such power will avail him but little if he is ignorant of the language in which the laws were originally promulgated. He will be compelled to rely on others for

[1] Burnell's Pref. Varadaraj; Nelson's Hindu Law, p. 20.

the facts on which his theories are founded, and can thus never be regarded as an authority on any disputed question. Such, unfortunately, is the position of many of our would-be critics of Hindu law, and we are thus compelled to regard as *nil* their pretensions to exact knowledge of their subject. LECTURE VII.

It is impossible to refrain from smiling when we hear them ask, "Has such a thing as *Hindu Law* at any time existed in the world? Or is it that Hindu law is a mere phantom of the brain, imagined by Sanskritists without law and lawyers without Sanskrit?" No wonder that they have been unable to bring themselves to believe that law has at any time been known to the so-called *Hindu* population of India. They look at *law*, they tell us, from Austin's point of view, and regard a body of law as an aggregate of commands from political superiors to their inferiors. The masterly analysis by Austin of the ideas which underlie the conception of law is not at fault; these would-be critics, who carp at the time-honored Hindu lawyers, deal in things of which they are entirely ignorant. According to Austin, it is the body of commands issued by the rulers of a political society to its members, which lawyers call by the name 'law.' It is only necessary to modify this conception of the term to adapt it to Hindu law. We hear our critics exclaim, "Manu cannot be supposed to have set laws to India; and if Manu did not set laws to India, who else can be

The latter question answered in the affirmative.

LECTURE VII.

supposed to have done this?" "If Hindu law," according to them, "ever existed, which is very difficult to believe, it is almost impossible," it seems to them, "to believe that schools of Hindu law have been established and have flourished." If Hindu law is a mere phantom of the brain, it stands to reason that the schools of Hindu law can have no logical existence. The reasoning certainly is faultless! How can a thing, which depends upon another for its existence, manifest itself when the substratum itself is a metaphysical nonentity? We give credit to our critics for consummate skill in metaphysical wrangling; but what should we say of the premiss upon which they found their conclusions? The premiss is wrong, and, therefore, by the syllogistic canons of Aristotle, we must not say of Gautama, the conclusion is erroneous. Hindu law does exist, and has existed for upwards of *at least* three thousand years, and has governed the Hindu community in the same sense in which the Statutes of the British Parliament govern the subjects of the Queen of Great Britain and Ireland. We have shown in a previous lecture that the laws enacted by Gautama, Baudhayana, and Apastamba — nay even by Manu and Yajnavalkya—and others, under the authority of the "spiritual brotherhoods" of ancient India, were binding upon the members of those societies. These groups of men exercised the powers of political societies and religious frater-

Was Hindu law itself ever existent?

naties. Sovereign powers were vested in them, and the laws promulgated under their authority, governed all the members of the associations. Nay more. Gautama and Apastamba and Baudhayana are said to have been the original founders of the fraternities, and were presidents of the small republics, whose word was law to those who paid homage, and owed fealty to the president of the political association, who was virtually the sovereign of the political society.

LECTURE VII.

Elphinstone quoted in support.

This was the origin of the original schools of law, upon the remains of which the present schools are founded. Mr. Elphinstone, deriving his information from inscriptions and other original records, in speaking of the government enjoyed by Kerala, or Calicut, in ancient times, says: "However the population may have been introduced, all accounts agree that Kerala was, from the first, possessed by Brahmins, who divided it into sixty-four districts, and governed it by means of a general assembly of their caste, renting the lands to men of inferior classes. The executive government was held by a Brahmin elected every three years, and assisted by a council of four of the same tribe."[1] Now can it be denied that this "council of four" possessed sovereign powers, and the law framed by them was not "the law of the lawyers"? And what were the laws which were administered by this "council."

[1] Elphinstone's History of India, p. 240, Fifth Edn.

LECTURE VII.

These were the Codes of Manu and Yajnavalkya, against whom our learned critics have directed their scathing sarcasms.

Import of the term "law" as it governed different principalities in India.

Admitting that India in ancient times was divided into a large number of small principalities, it would be a fair question to ask by what laws were those principalities governed? The answer is, that these were laws which Gautama and Baudhayana, Manu and Yajnavalkya had framed. Local usages may have modified those laws to suit the circumstances of the districts in which they were administered. But when the sovereign of the district gave his sanction, or rather adopted the ancient codes, how can it be denied that the law thus administered was not "the law of the lawyers, the command of the sovereign?"

If we remember then that Hindu law was originally promulgated by the "spiritual brotherhoods," adopted by political associations, and administered by real live sovereigns, it would be great fool-hardiness to maintain that Hindu law was "a phantom of the brain," and ought to be relegated to the regions of Limbo—

> "A limbo large and broad, since called
> The paradise of fools."

Dr. Burnell's theory of the probable non-existence of the

This much about the entity of Hindu law. Now what should we say about the schools of law, the existence of which is also doubted? Had not the authority of Dr. Burnell, a ripe Sanskrit scholar,

Lecture VII.

Schools of Hindu law controverted.

and a professed lawyer, been invoked, we would not have taken the least trouble to disabuse the minds of men, who are determined to persist in error. We wonder how Dr. Burnell could lend himself to such a preposterous statement. Is it possible that the learned Doctor did not consult the original authorities, which are certainly accessible to him? How could he misunderstand the clear and explicit language of "the original texts and digests"? The learned Doctor says, "another principle deduced by English lawyers is the doctrine of *Schools of Hindu Law*. This is unnecessary and foreign to the original texts and digests."[1] With all due deference to the vast erudition of the Doctor, we would submit that the statement is erroneous and misleading. He must have made the statement quoted above off the books. We would refer him to the *Mitakshara*, in which Vijnanesvara cites, and refutes the opinions of "the Northern" and "the Southern Schools."[2] Vijnanesvara himself was one of the most prominent advocates, if not the founder, of the Central School. Now the Northern school must have been the Mithila school, and the Southern school was the Dravira school. We find no mention of the Gauriya and the Maharashtra schools, it is true; but the absence of any allusion to them does not vitiate our argument. The Bengal and the Maharastra schools were of later growth. The Maharastra school is simply an

[1] Burnell's Varadaraja, Pref.

[2] Mitakshara, I, 155.

LECTURE VII.

offshoot of the Mitakshara school, and ought not to be at present taken into consideration. But that this school also has an independent existence, cannot for a moment be doubted. We are speaking now of the four original schools.

We will refer to two more authorities in support of our position, and we have done. Vachaspati Misra, the author of Vivada Chintamani, speaks of "the *Legislators of Mithila*, and those of other provinces."[1] Vivada Chintamani is a work of great authority in the Mithila school; and when we find that a clear distinction is made in it between the lawyers of this and "others," we must accept it as a fact that at the time of Vachaspati Misra at least Hindu lawyers were distributed into different schools. We would also draw the attention of those who would deny the existence of separate schools of Hindu law to that chapter of *Nirnaya Sindhu* — a treatise well-known, and of high repute, and universally followed in almost all the schools—in which Kamalakara discusses the nature of *Sapinda* relationship, the great bone of contention among the legislators of India. There we find the different schools mentioned in distinct terms by Kamalakara. There also we find *five* great divisions of Hindu lawyers clearly indicated—Vijnanesvara, Visvesvara Bhatta, *and others* belong to *one* class of lawyers; the Gauras belong to *another* class; the Maithilas belong

[1] Vivada Chintamani, p. 169.

Lecture VII.

to the *third* class; Apararka, Medhatithi, Madhava and others belong to the *fourth* class; and the Maharashtra school comes in probably as the *fifth*.[1] We will not multiply our authorities. Suffice it to say that the argument of those—who hold that the distribution of Hindu lawyers into different schools is "unnecessary" and foreign to the original texts and digests—is refuted by the "texts" and digests themselves.

The English word "school" has its counterpart in the original Sanskrit works.

I have been often asked whether there is any word in original Sanskrit which expresses the same sense as the term "School" does in English? If any marked difference existed, and was recognised among the Hindu lawyers, as regards the peculiar doctrines entertained by them, surely, we are told, there should be a term in Sanskrit which should mark this distinction. Our answer is, that there is a word in Sanskrit which is often used in the same sense in which the word "School" is employed. The word we refer to is "*Sampradaya.*" A *received doctrine*[2] was originally called "Sampradaya," and hence the class of men who entertained peculiar doctrines were designated by this name. The term is not confined to religious associations, but is indiscriminately used for any class of men also who have a set of doctrines of their own. In law-treatises, however, the word *Sampradaya* is seldom met with.

"Sampradaya."

[1] Nirnaya Sindhu, Luck. ed., pp. 234—240.

[2] Amara Kosha, 2nd ed., by Colebrooke, 1825.

The distinction between the different schools is there marked by citing the different classes of lawyers according to their generic names. We meet them there classified as "Maithilas," "Gauras," "Dakshinatyas," &c.; or in other words, as the legislators of Mithila, of Gaura or Bengal, of the South, and so on. The word school expresses nothing more than an "assemblage of teachers and scholars who hold a common doctrine, or accept the same teachings." The term *Maithilas*, or *Gauras*, gives the same sense—the classes of men who hold the doctrines, and accept the teachings, of some common professors and legislators, be they of Mithila or Bengal; and who are thus formed into a community separate from similar fraternities.

Resemblance between the laws of different schools.

It will thus be seen that *Hindu Law* is not a nonentity, and *the schools* of Hindu law are not a myth. They are not impalpable essences, but can be seen and felt and touched in every direction we move.

We hear also people say, though "you divide the Hindu lawyers into different schools, yet each school has its own law, and this law does not bear the least resemblance to that of the other schools." We know that there are people who hold this opinion, and who could not be led to believe that the general principles of Hindu law are common to all the schools. If the Mitakshara, for instance, is silent on any point which can be made clear by referring

it to some general principle of Hindu law, they could not be persuaded to look for the elucidation of that obscure point in the standard works of other schools. Mitakshara, according to them, must stand or fall on its own merits, and no borrowed light must be allowed to penetrate the darkness which envelops some parts of the great treatise of Vijnanesvara. The author of the Mitakshara, in writing his abridgment, could never have dreamt, that his summary would ever remain isolated from other standard works. Had he known this, he would never have written an Abridgment of Visvarupa, and called it Mitakshara, or a Brief Summary; but would have written a voluminous treatise, and called it *Vistritakshara*, or a lugubrious paraphrase of the Code of Yajnavalkya.

Which are all based upon the same general principles.

The primary sources of Hindu Law being common to all the schools, we have a right to expect that the *general principles* of Hindu law are also common to all the schools. These principles grew out of data furnished by social phenomena existing for upwards of two thousand years. The phenomena were subjected to a searching analysis by the medieval sages, and yielded results which experience has shown to be true and invariable. Local circumstances, and the progressive changes of society, have in some cases modified the rules of conduct framed by the medieval legislators, it is true, but the groundwork remains the same, and

LECTURE VII.

the subsequent alterations and additions serve only to bring into greater relief the original principles, which were immovably fixed by the great founders of Hindu Law. The authors of the accepted commentaries and digests have simply adapted these principles to the circumstances by which they were surrounded, and fashioned them according to the peculiar conditions of society with which they had to deal. The whole Hindu community would have indignantly refused adherence to the principles enunciated by the authors of Mitakshara or Dayabhaga, Chandrika or Chintamani, if they had framed any law, which was not sanctioned by the authority of the great legislators of ancient India, the founders of Hindu society. They would have scouted the idea of an entirely new system of jurisprudence, which neither the Vedic rishis, nor the medieval sages had hallowed by their names.

Variations how effected.

The authors of the digests were well aware of this fact. Whatever principles were established by them were shown to have proceeded either directly from the ancient texts, or were reasoned out of them. Advancing civilization did in some instances reject the *archaic* laws, and substitute others more consonant with the spirit of the times. Whenever any attempt was made to abrogate the *archaic* laws, it was pointed out that in the *Kali* age these laws could not be enforced, because in this degenerate age men did not possess the strength and the power of

the ancients, and the laws and usages which were applicable to giants were not suited to pigmies. A door was thus left open for subsequent changes in the positive law, it is true, but the original principles of Hindu Law were maintained in all their integrity. The attempt sometimes failed, but whenever a divergence from them was necessitated by established local usages, the new rule of conduct was presented in such a form that it was difficult to distinguish the new law from the laws of the ancients.

Integral character of Hindu law.

What then we contend for is, that Hindu Law must be taken as *a whole*, and must not be thought to be different in different schools. The commentators and the authors of the digests never ignored the existence of the standard works of the different schools, and whenever any general principle of Hindu Law was under discussion, they quoted the authority of the founders and followers of the other schools, either in support of their views, or cited texts from them to give them a formal refutation. The founders and the advocates of the different schools were the subjects of a common republic, and though they belonged to different cantons and districts, and embodied the local usages of each district in their codes, they never for a moment dreamt of establishing new systems of jurisprudence, but aimed at elucidating the general principles which governed Hindu law in all its branches. The authors of the commentaries and digests borrowed from each other, discussed, some-

LECTURE VII.

times as friends and sometimes as opponents, the interpretation which each put upon the ancient texts, and thus by continual intellectual friction brought out sparks of fire which destroyed error and discovered truth. Read any of the digests you like, and you will find that the legislators of one school never repudiate the doctrines of the other schools, but sometimes try to refute them by argument, and oftener attempt to assimilate them with those which prevail in his own school.

Relation between the approved treatises of law of different schools.

There cannot then be a greater mistake than to suppose that the doctrines of the Bengal or Benares school must be gathered from the professed advocates of those schools *alone*, and must on no account be judged by the light which may be thrown upon them by the standard works of other schools. As regards the local differences, the peculiar usages of each school, the prevailing authorities of each should certainly be respected, and accepted as the primary sources from which these differences should be known and judged on their own merits. But whenever any general principle of Hindu Law is under consideration, any light which may be thrown upon the vexed point should be gratefully received, and carefully analysed, before it is excluded from the field of discussion. It is this mistake, this misapprehension on the part of those who are entrusted with the administration of Hindu Law, which has led to the perpetuation of error, and exposed the works of master

minds, such as the Mitakshara and the Dayabhaga, to the oft-repeated charge of inconsistency, vagueness, and obscurity. The Mitakshara and the Dayabhaga are not vague and obscure, but the principles of interpretation applied to them are defective. So long as men persist in their contracted views, and do not adopt broad and catholic principles of interpretation, Hindu Law will remain a sealed book to you, and the key of the innumerable treasures it contains will be withheld from you. In other branches of Indian law, you do not for a moment hesitate to apply principles of interpretation which have been found by experience to be right and unerring, then why this reluctance to apply the same principles to a subject which, more than any other, requires scientific analysis and critical acumen in their treatment? People go away with the belief that Hindu law is inexplicable, and loudly complain that they are "confounded by the perpetual conflict of discordant opinions and jarring deductions." The masterly works of the founders and the expounders of Hindu Law clearly and unmistakably lay down principles which are the basis of the law, and the train of reasoning by which they maintain their argument is faultless to a degree. But it is forgotten that the Hindu Law is like a complicated piece of machinery, the relation of the different parts of which can never be understood, unless it be taken as a whole and the general design be perfectly comprehended. Then the different parts

How it is possible to dive into the fundamental principles.

Lecture VII.

will be seen to be thoroughly fitted to each other, and admirably performing the action which was assigned by the designer separately to each. Then the observer will not be lost in a bewildering maze of valves, screws, eccentrics, and other minutiæ, but will be filled with rational admiration at the manifestations of the towering genius of the great designer. The general design of Hindu Law has not yet been thoroughly comprehended, and there is no chance of its being so comprehended, unless *all* its sources are accessible to the jurists of the day. They are all locked up in dark caverns, the cabalistic *mantras* for opening the gates of which are known only to the initiated few. A thorough knowledge of Sanskrit, combined with an extensive knowledge of modern jurisprudence, is the charm by which alone the doors of the dark recesses containing untold treasures which the wisdom and the industry of countless generations have amassed within them,—will fly open. He who does not possess this knowledge, to him the spell loses its power; and he who would hope to conjure with it would find himself as much mistaken as Cassim, who in the Arabian Nights stood crying "open wheat," "open barley," to the door of the robbers' dungeon which obeyed no sound, but "open Sesame."

How to study the subject.

The difficulty which besets the path of a student of Hindu Law, would be greatly removed if he would bear in mind that Hindu Law has followed a course

of *development*, similar to the law of other nations, and that its growth has *not yet* been arrested. The "conflicting doctrines" and "the jarring elements," which are complained of, can all be explained away by the fact that they were not the products of the same age, but came into existence in different ages, to suit different conditions of society, in different provinces. Unless the erroneous belief that Hindu Law has been "built in a day" be totally extinguished; unless the mistaken notion that the past history of Hindu Law is veiled in total obscurity, be wholly rooted out, Hindu Law, for a long time yet, will have to struggle against ignorance and misconception. Ignorant intermeddlers will declare it to be a nonentity, and industrious students who are sincerely desirous to learn the true nature of Hindu Law, will be staggered in their researches by the presumptuous assumptions of legal charlatans making unwarrantable pretensions. If the eminent jurists of the day, and the learned Judges of our Courts, would husband the meagre resources at their command, and compare and contrast the doctrines of the different schools, mark the differences and divergences noticed in each school, and then subject them to a searching analysis by applying to them the recognised general principles of Hindu Law, much may be done to clear up the dark passages which have puzzled and confounded both the Judges and the Counsel of British Courts of Law. It should be

the object of the jurists of the day to point out the landmarks in the history of Hindu Law, and to clearly indicate the different stages of its development. We know that the stereotyped complaint of the total absence of historical materials will be made, and Hindu Law will be thrown into the lumber-room, where it has lain so long, and where it is destined to remain for a long time yet. Those who complain about the absence of "historical materials" ought to consider that a literature, which abounds in the richest materials in all conceivable branches of knowledge, cannot fail to furnish us with facts, from which, by a process of scientific analysis and generalization, a satisfactory history of Hindu Law could be written. The task is worth attempting, and he who would satisfactorily perform this great task would lay the students of Hindu Law under lasting obligations.

LECTURE VIII.

MODERN TEXT-WRITERS.



Comparative ages of the approved commentators and digest makers. *Madhavácharya*—Born early in the fourteenth century—Vijnanesvara—His own account of himself—Facts deducible therefrom—His native place Kalyana, capital of the Chalukyas in the Deccan—Chalukyas—Mitakshara written towards the close of the eleventh century—Corroboration by modern researches — Elliot's examination of the inscriptions of the Chalukya kings—In keeping with Bilhana's account—The two Vikramas—Mitakshara written during the reign of Vikrama II—Conclusively proved by the mention of Dharesvara's name in it—Three other Vikramas mentioned in the inscriptions—None of whom can be identified with Vijnanesvara's prince of the same name—Arguments in support of this view—*Apararka*—Account given by himself—A member of the Silahara tribe—The Silaharas—Ramified into two families—Their relation with the Chalukyas—Omission of the name of each from other's work accounted for—Internal evidence as to Apararka's posteriority—Positive proof—His work published in the first half of the twelfth century—Devananda Bhatta, author of Smriti Chandrika—Opinion that he flourished during the existence of Vidyanagara dominion controverted—His date the middle of the 12th century—Bisvesvara Bhatta—His work Parijata composed towards the close of the 12th century—Colebrooke's erroneous computation of date — Lakshmidhara, author of Kalpataru—Pratab Rudra, author of Saraswati Vilasa—Chandesvara, author of Vivada Ratnakara, contemporary of Pratapa Rudra—Flourished at the beginning of the 14th century—Facts in proof cited—*Lakshmi Devi*—Composed her work Vivada Chandra towards the close of the 14th century—Vachaspati Misra—Wrote Vivada Chintamani about the beginning of the 15th century—Jimutavahana, author of Dayabhaga—His age assigned to the beginning of the 15th century—*Raghunandana*; beginning of the 16th century—*Mitra Misra*, about the end of the 16th century—*Nanda Pandita*, author of the Dattaka Mimansa, A.C. 1633—*Balam Bhatta*, middle of the 17th

LECTURE VIII.

century—*Kamalakara*, author of Nirnaya Sindhu, 1612 A.C.—*Nilakantha*, author of Vyavahara Mayukha, 17th century — Srikrishna Tarkalankara, early period of the 18th century—Summary.

Comparative ages of the approved commentators and digest makers.

We will now attempt to ascertain the comparative ages of some of the eminent text-writers whose works have been justly called the foundation of modern Hindu law.

Madhavácharya.

We will begin with Madhava, "one of the greatest Hindu scholars and divines that graced the mediæval literature of India. He is famed for his numerous and important works relating to the vedic, philosophical, legal, and grammatical writings of the ancient Hindus, and also for his political connection with the history of some of the renowned kings of Vijayanagara in the Deccan."

The date of Madhava has been fixed beyond the possibility of a doubt. He is the author of a commentary on Parasara's code of law. This treatise, especially the Chapter on Inheritance, is reckoned as one of the standard authorities in the Benares, Dravira, and Maharastra Schools of Law, and is also held in high respect in the Bengal and Mithila Schools. The date of Madhava will help us to find the comparative ages of the modern text-writers.

Madhava thus gives us a glimpse of his personal history in the Introduction to his Commentary :—

"As Angira was of Indra, Sumati of Nala, and Medhatithi of Sochya, so Madhava is the spiritual guide and the political minister of king Bukka.

Sukirti is the name of his mother, and Mayana of his father. The learned Sáyana and Bhoganatha are his brothers. His family is descended from the stock of Bharadwaja, follows one of the Sakhás of Yajur-Veda, and has adopted the Sutras of Baudhayana." LECTURE VIII.

Madhava then was the prime minister of king Bukka. The king Bukka referred to here was the third king of Vijayanagara, whose reign commenced about 1361.

The kingdom of Vijayanagara was founded during the disorders produced by the misgovernment of Mahomed Toghlakh. Ferishta thus alludes to the fact: "This year (1344), Krishna Nayaka, the son of Rudra Deva, who lived near Warangol, went privately to Ballala Dev, Raja of the Carnatic, and told him that he had heard that the Mahomedans, who were now very numerous in the Deccan, had formed the design of extirpating all the Hindus, and that it was, therefore, advisable to combine against them. Ballala Dev convened a meeting of his kinsmen, and resolved, first, to secure the forts of his own country, and then to remove his seat of government to the mountains. Krishna Nayaka promised on his part also, that when their plans were ripe for execution, to raise all the Hindus of Warangol and Tailangana, and put himself at their head.

"Ballala Dev, accordingly, built a strong city upon the frontiers of his dominions, and called it after his son

LECTURE VIII.

Bijaya, to which the word *nagara*, or city, was added, so that it is now known by the name of Bijayanagara. He then raised an army, and put part of it under the command of Krishna Nayaka, who reduced Warangol, and compelled Imad-ul-Mulk, the governor, to retreat to Dowlatabad. Ballala Dev and Krishna Nayaka united to their forces the troops of the Rajas of Maabir and Dwara-Sumudra, who were formerly tributaries of the government of the Carnatic. The confederate Hindus seized the country occupied by the Mahomedans in the Deccan and expelled them, so that within a few months, Mahomed Toghlakh had no possessions in that quarter except Dowlatabad."[1]

The account given by Ferishta of the founding of Vijayanagara was evidently gathered from the traditions which were current in his time. He was mistaken when he affirmed that the city of Vijayanagara was founded by Ballala Dev. It was founded by the two brothers Harihara and Bukkaraja.[2]

We learn the genealogy of king Bukka from an inscription,[3] containing a land-grant by his grandson, dated 1347 Salivahana era, corresponding to 1395 A.C.

"King Sangama had five sons, Harihara, Kampa, Bukkaraja, who was sovereign of the earth, Marapa, and Mudgapa.

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[1] Brigg's Ferishta, Vol. I, p. 427.

[2] Colebrooke's Miscellaneous Essays, Vol. II, p. 229.

[3] Asiatic Researches, Vol. IX.

"Among these five graceful princes, the most celebrated was Bukka, sovereign of the earth, conspicuous for valour as Arjuna among the Pandavas.

"When his army, in warlike array, performed evolutions on the frontier of his dominions, the Turushkas felt their mouths parched, the Kankanas terrified, apprehended impending death, the Andhras fled in consternation to the caverns, the Gurjaras trembled, the Kambojas lost their firmness, and the Kalingas were quickly discomfited.

"By that victorious king was Vidyanagari (another name for Vijayanagara) made a permanent metropolis; a fortunate city, which is adapted to promote universal conquest."

The names of Harihara, Bukka, and Kampa, as well as that of their father, occur in the writings of Madhava and Sáyana. As regards the identification of Madhava, therefore, and of his patrons, there is not the shadow of a doubt.

The result of the enquiry into the history of Madhava may now be stated as follows:—

The State of Vijayanagara is very generally admitted to have arisen on the subversion of the Hindu governments of the Kakateya and Ballala Rajas by the incursions of the Mahomedans in the beginning of the fourteenth century, and the traditions agree as to the individuals to whom its foundation is ascribed, *viz.*, Harihara, Bukkaraja, and the celebrated scholar Madhava, entitled *Vidyaranya*, or

LECTURE VIII.

the forest of learning. The date most commonly given for the foundation of Vijayanagara, on the southern bank of the Tungabhadra, is 1258 Sal., or 1336 A. C. The earliest of the grants of Bukkaraja is dated 1370 A.C., and the latest 1375. The duration of his reign is usually stated to have been fourteen years, which would place his accession to the throne in 1361.

Born early in the fourteenth century.

The birthplace of Madhava is said to have been Pampa, a village situated on the bank of the river Tungabhadra. All the accounts of his life agree as to his having been the prime minister of Sangama and of his sons Harihara and Bukka. Madhava died at the ripe age of ninety. The date of his birth coincides with the beginning of the fourteenth century.[1]

It is clear then that Madhava's commentary on Parasara's code was written between 1361—1375.

Quotations are found in Madhava's work from Vijnanesvara's Mitakshara and Devananda Bhatta's Smriti Chandrika.

Vijnanesvara.

Let us now try to gather all the information we can about the life and writings of Vijnanesvara, who may be justly termed the founder of modern Hindu law.

His own account of himself.

The great commentator thus speaks of himself in his celebrated work :

[1] Wilson's Mackenzie Collection, Vol. I, Intro., p. 12 ; Goldstücker's Literary Remains, Vol. I, p. 101.

"The code of law which has been promulgated by Yajnavalkya, and expounded by Visvarupa in language hard and turgid, is abridged by me in a simple and concise style, after repeatedly considering each text of my author.[1]

LECTURE VIII.

"I am the son of Padmanabha Bhatta of the stock of Bharadwaja. I am a religious mendicant, and giving up all interest in worldly pursuits, I have entirely devoted myself to the worship of God (*parama hansa*). I am a disciple of one (Visvarupa) who well deserves the title of *uttama*, or excellent. This commentary on Yajnavalkya's code is my work. No other learned author attempted, before Visvarupa, to explain the texts of Yajnavalkya. I have tried to explain the meaning of my author in simple and concise language; and my commentary, it is hoped, will afford matter for reflection to the thoughtful.[2]

"My object has been to explain as concisely as possible the texts of Yajnavalkya, but, in doing so, I have not, to the best of my knowledge, omitted the explanation of a single word or letter, nay even of a single dot, of the text. But it is not improbable that I have sometimes misconceived the true intention of the great sage. If the learned should meet with any such error, I beg them to correct it, remembering that all writers are liable to error.[3]

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[1] I. Intro. [2] III. Conclusion. [3] II. Intro.

LECTURE VIII.

"There neither is, nor has been, nor will be, a city like *Kalyana* on the surface of the earth, and in no quarter of the globe has a sovereign been seen or heard of as powerful as *Bikramarka*, who is lord over this city. Pandita Vijnanesvara will not lose by comparison with other learned men. May Vijnanesvara, his sovereign, and his native city live through the countless ages of eternity.

"Long life to king Vikrama, whose urbanity of manners, generosity and magnanimity of character, devotion to Vishnu, valour in the field, and mastery over all branches of knowledge, are well known to the world, and have often excited the admiration of the good and the great.

"May the king—whose kingdom extends southwards to that immortal bridge, which declares the eternal glory of the great ornament of Raghu's race; which is bounded on the north by the king of mountains; and which is surrounded on the east and west by the sea, the waves of which are continually tossed with the violent motion of animals of fabulous size—govern this earth as long as the sun and the moon irradiate the sky; and may he ever plant his foot upon the heads of humble and submissive chieftains, the enemies of his race."[1]

Facts deducible therefrom.

I have given you the substance of Vijnanesvara's own words. We derive three historical facts from this account. Vijnanesvara was a native of Kalyana,

[1] III. Conclusion.

and flourished during the reign of Vikramarka, or Vikramaditya, who was a worshipper of Vishnu. Lecture VIII.

His native place Kalyana capital of the Chalukyas in the Deccan.

Now Kalyana was the capital of the Chalukyas, in the Deccan. The city still exists under the same name, about a 100 miles to the west and a little to the north of Hydrabad.[1] The city is of ancient origin, but the Chalukyas made its name famous in mediæval India. We find it mentioned in stories and in songs. The kings of Kalyana took a pride in embellishing it with lofty palaces and splendid reservoirs of water.[2] The ruins of the palaces still attest their former magnificence, and the enormous tanks and other works of the Kalyana princes still excite the admiration of travellers.[3]

Chalukyas.

But who were these princes ? They belonged to the Chalukya dynasty. The Chalukyas belonged to the great tribe that, under the general name of Rajputs, exercised dominion over the whole of Northern and Central India. The Chalukyas of Kalyana can be traced with certainty by inscriptions from the end of the tenth to the end of the twelfth century.

But before we come to the inscriptions, let us see what Bilhana, the poet-historian of the Chalukya family, says of them in his work :[4]

" One day Brahma was engaged in his morning devotions, when Indra presented himself before

[1] Elliot. Madras Jour. Lit. Sc., Jan. 1858

[2] Bikrama Charita II. 1—10.

[3] Royal Asiatic Society's Journal, IV.

[4] Bühler's Vikrama Charita.

LECTURE VIII.

him, and represented to him the godlessness of the kings of the earth. Moved by the earnest entreaties of Indra, Brahma fixed his looks upon a vessel (*chuluka*) containing water intended for devotional ablutions. Immediately there arose from it a mighty warrior armed *capapie*, who, at the behest of Brahma, extirpated the tyrranous sovereigns of the earth, and made his name a terror to the godless. There sprung from him a noble family, distinguished by the honored names of Harita and Manavya, who fixed their seat at Ajodhya. The desire of conquest brought them to the south, where betel palms waved their branches. The war-songs, celebrating the victorious exploits of this race of kings, were playfully written by the tusks of noble elephants on the shore of the southern sea, which had long witnessed the secret counsels of the Chola chiefs.

" In course of time Sri Tailapa, whose high spirit and unequalled valour won the admiration even of his enemies, added fresh lustre to his family by his great achievements. He rooted out the *Rashtrakutas*, the thorns of the earth, and the good genius of the Chalukya race came back to him with pleasure.

" Then Satyasraya, the ornament of the Chalukya race, wielded the sceptre of sovereignty. Some time after that the Chalukya throne was graced by Sri Jaya Sinha, whose war-elephants struck terror into the heart of his enemies.

"From him came Ahava Malla, who was also known by the name of Trailokya Malla. He was a great warrior. In tales and in songs, in dramas and in epic poems, his praises were sung by eminent poets. He stormed *Dhara*, which declared the glory of the Pramaras of Malwa and forced king Bhoja to submit. The Cholas of Kanchi felt his power; and the chief of Dravira, who ran to encounter him, was obliged to sue for peace. The city of Kalyana was rebuilt by him, and its splendour surpassed even the beauty of Indra's heaven.

"This king had two sons, Somesvara and Vikrama. The latter deposed the former, and reigned in peace, making all his enemies, the Cholas, the Pramaras, and others kiss his lotus feet. He was married to a daughter of the king of Karahata (a Silahara prince); a princess of the Chola family also became his queen."

Bilhana, the poet laureate of Vikrama, has filled eighteen cantos of his work with a description of the achievements of Vikrama. With these we have no other concern than that Vikrama was a great patron of learning, and his reign marked an era in the Chalukya empire. The Chalukya raj was at the zenith of its power in his time, and it declined after his death.

But we will not anticipate events, but patiently listen to the account of the Chalukyas given by modern historians who have derived their stores of information from inscriptions which have come to

LECTURE VIII.

light. Before we do so, however, let us bear in mind the account given by Bilhana. He mentions the names of Tailapa, Satyasraya, Jaya Sinha, Ahava Malla, Somesvara, and Vikrama, who were brothers. There must have been other kings both before and after Tailapa, who deserved separate notice. From the manner in which the achievements of Tailapa are described, it is quite clear that the prestige and the influence of the Chalukya family were destroyed by the *Rashtrakutas*, and their kingdom was conquered by them. Tailapa must have re-established the Chalukya sovereignty, and a new line of kings governed the kingdom, eclipsing the fame of former sovereigns.

Mitakshara written towards the close of the eleventh century.

In all this we are principally interested in the fact that, in the restored Chalukya dynasty, there was a king, whose name was Vikrama, and who was a mighty monarch, contemporary with the Pramara chiefs of Dhara. Vijnanesvara, the author of the Mitakshara, says, that his treatise was composed during the reign of Vikrama, the king of Kalyana. In Bilhana's account we find mention of that king in whose court Bilhana was the chief poet, and in whose council Vijnanesvara was entrusted with legislative work. The father of Vikrama, says Bilhana, subjugated Dhara, the capital of Raja Bhoja, who reigned in Malwa, according to the unanimous testimony of eminent antiquarians such as Colebrooke, Lassen, Hall, Bühler, Dr. Rajendrolala and others, in the middle of the eleventh

century. Ancient inscriptions, and the casual notices we find of Bhoja, leave no doubt that this date is quite correct. If the father, then, of Vikrama flourished in the middle of the eleventh century, Vikrama, who was the younger of two brothers, must have occupied the Chalukya throne of Kalyana, if we are to believe the account of Bilhana, during the latter half of the eleventh century. The Mitakshara was composed during this reign, and we cannot resist the conclusion that the work must have been written at the end of the eleventh century.

Corroboration by modern researches.

This date is borne out by modern researches into the history of the Chalukyas of Kalyana. The inscriptions and coins which have come to light, and which have been deciphered with great ability and skill, leave no doubt that Vikrama reigned in Kalyana in the latter end of the eleventh century. Let us see what the modern antiquarians who have published a large number of their inscriptions say about the Chalukya kings:

Elliot's examination of the inscriptions of the Chalukya kings.

"Previous to the arrival of the first Chalukya in the Deccan, the Pallavas were the dominant race. In the reign of Trilochana Pallava, an invading army, headed by Jaya Sinha, surnamed Bijayaditya of the Chalukya kula, crossed the Nerbudda, but failed to secure a permanent footing. Jaya Sinha seems to have lost his life in the attempt, for his queen, then pregnant, is described as flying after his death, and taking refuge with a Brahman called Vishnu

Somayaji, in whose house she gave birth to a son, named Raja Sinha, who subsequently bore the titles of Rana Raja and Vishnu Vardhana. On attaining to man's state, he renewed the contest with the Pallavas, in which he was finally successful, cementing his power by a marriage with a princess of that race, and transmitting the kingdom thus founded to his posterity. His son and successor was Palakeshi, and his son was Vijayaditya II. A copper sásana, recording a grant made by Palakeshi, which bears date S.S. 411 or A.D. 489, is extant in the British Museum. The next king was Kirti Varma, who left two sons, the elder of whom, Satyasraya, succeeded him in the kingdom of Kuntaladesa, the capital of which was Kalyana, while the younger, Kubja Vishnu Vardhana, or Vishnu Vardhana the Little, established a new seat for himself in Telingana by the conquest of Venjipuram, the capital of the Vengidesam, which comprised the districts between the Godaveri and the Krishna below the Ghats. This event appears to have taken place about the end of the sixth or beginning of the seventh century.

"The two families ruled over the whole of the table-land between the Nerbudda and the Krishna, together with the coast of the Bay of Bengal, from Ganjam to Nellore, for about five centuries. The power of the Kalyana dynasty was subverted for a time in the end of the ninth or beginning of the tenth century, and the emigrant prince succeeded by mar-

riage in A.D. 931 to the throne of Anhalwara Pattan in Guzerat, which his descendants occupied with great glory till A.D. 1145. But in A.D. 973 the dynasty of Kalyana was restored in the person of Tailapa Deva, and ruled with greater splendour than before till its extinction in A.D. 1189 by Bijjala Deva, the founder of the Kalabhurya dynasty.

"The Chalukyas were of lunar race, and apparently worshippers of Vishnu. The fact of Raja Sinha having been educated by Vishṇu Bhatta Somayaji, a Vaishnava Brahmin, probably tended to confirm the attachment of the family to this creed."[1]

We read again that Tailapa, in whose person the dynasty of Kalyana was restored, having conquered the Rattas, began to reign in S. 895, corresponding to A.C. 973. He is described as a new shoot of the royal tree of Chalukya, rescuing his hereditary dominions from the grasp of the enemy, and as overthrowing the Ratta kula. Tailapa was succeeded by his son Satya Sri, who, dying without issue, was followed successively by his nephews Vikrama I. and Jaya Sinha. The son of the latter, Somesvara Deva I., had two titles, Trailokya Malla and Ahava Malla. He is described as defeating Chola, burning Kanchi, besieging Ujjayini, and as "cutting the necks of the lords of Malava, of Chola, and of Kanyakubja, and overcoming his most powerful enemies who had attained superiority over all." His

[1] Elliot. Madras Jour. Lit. Sc., 1858.

elder son and successor, who was named Somesvara II., was expelled by his younger brother Vikrama II. Somesvara II. having enjoyed the raj a little while, "acted with tyranny, and oppressing the people, lost their affections. His brother was a pattern of every virtue. He having overthrown his enemies by personal valour, became lord of all the earth, with the title of Tribhuvana Malla Chalukya Vikramaditya Nripa. Having set aside the Saka, he established the Vikrama Saka in his own name."

Vikrama II. was one of the most powerful princes of his race. He occupied the throne for fifty-one years. The large number of inscriptions, 151 in all, which have been recovered, have thrown a flood of light upon the history of this prince. We learn from them that in S. 1003 (the fifth of his reign) he overcame "Balavaraja of the Pala race;" and in S. 1010 he "crossed the Narmada river, and conquered Kanama and others." But in general his reign was one of undisturbed peace. He built and beautified a town called after his own name, Vikramapura, where an enormous tank and other works attest its former splendour.

In S. 1049, Vikrama was succeeded by his son Somesvara III., who, in his turn, was followed by two of his sons.

The Chalukya dynasty, which had reached the zenith of its power under the second Vikrama, began now rapidly to decline. A powerful noble,

named Vijjala, of the Kalabhurya race, had been appointed general of the Chalukya armies; and the influence which he thereby obtained he turned against his sovereign, and expelled him from his throne. Inscriptions in his name occur from Saka 1079, which is styled the second of his reign.[1]

In keeping with Bilhana's account.

The main features of Bilhaṇa's story are then exactly the same as those which are related in the inscriptions referring to the Chalukya dynasty of Kalyana. By comparing the two accounts we are justified in drawing the conclusion that the Vikrama of Bilhana and the Vikrama of the inscriptions are identical, and that great reliance ought to be placed in the account given by the poet-historiographer of the Chalukya family of Kalyana.

The two Vikramas.

We find from the inscriptions that, after the restoration of the Chalukya dynasty in S. 895, two princes of the same name of Vikrama occupied the throne of Kalyana. Vikrama I., the great grandson of Tailapa, ascended the throne in or about 1008 A. C., and Vikrama II. in 1076 A.C. Now the question is, which of these was the Vikramarka of Vijnanesvara, during whose reign the Mitakshara was composed? We have seen that Bilhana makes no mention of Vikrama I. in his account. He was apparently, therefore, a prince of not much consequence, and it is not probable that such an important work as the Mitakshara should have been composed under the auspices

Mitakshara written during the reign of Vikrama II.

[1] Elliot. Jour., Royal Asiatic Society, Vol. IV.

LECTURE VIII.

of a weak Government. Vikramaditya I. makes no figure in history. His existence is ignored altogether by the historiographer of his race, and it is not likely that the name of such a weak and imbecile sovereign should have been singled out and immortalized by Vijnanesvara, the prince of legislators ; the more so as it is the ambition of every great writer to connect his work with the reign of a distinguished prince.

Conclusively proved by the mention of Dharesvara's name in it.

The mention of Dharesvara, however, in the Mitakshara, practically decides the question. Dharesvara, as we have seen, was identical with Bhoja Deva of Dhara, who flourished in the middle of the eleventh century, and was contemporary with the father of Vikrama II. The age of Vikrama I. was anterior to that of Bhoja, and Vijnanesvara, therefore, could not have written his work during the reign of Vikrama I., and the conclusion is irresistible that the Mitakshara was composed during the latter half of the eleventh century.

Three other Vikramas mentioned in the inscriptions.

In conclusion I should bring it to your notice, that, before the restoration of the Chalukya dynasty at the end of the tenth century, the inscriptions mention the names of three other Vikramadityas of the Kalyana dynasty; and Tailapa himself is sometimes styled as Vikramaditya IV. As regards Tailapa, it should be remarked that he was better known by his proper name of Taila Bhupa, and as he was the prince " who, valiant as Indra, conquered in battle, with ease, the

kings of the Rashtrakuta race, and recovered from them the Chalukya kingdom, as Vishnu, in the shape of a boar, saved this earth from the Rakshasas,"[1] the name of Vikramaditya was seldom applied to him. Most of the inscriptions mention him by the name of Taila Bhupa, and he evidently, therefore, took a pride in that name. Vijnanesvara could not have designated him by a name which must have been disagreeable to him. He recovered the Chalukya kingdom by the name of Tailapa, and he wished to be known by that name. Whenever the name of Vikrama is joined with his name in the inscriptions, the name of Tailapa is given first, and this fact is conclusive in showing that Vijnanesvara's Vikrama could not have been identical with Tailapa.

None of whom can be identified with Vijnanesvara's prince of the same name.

The other three Vikramas might have been born in the Chalukya family, but their names are unknown to history. One of these Vikramas did not even occupy the throne of Kalyana. He lived and died during the time when the Chalukya dynasty was dispossessed of the throne of Kalyana. We have seen that Bilhana does not make the least mention of them; their very existence, therefore, was not recognized by the Chalukya family. They merely filled a gap, and no important event is connected with their names. I

Arguments in support of this view.

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[1] Journal of the Royal Asiatic Society, Vol. V.

LECTURE VIII. will give you, however, the approximate dates of their reigns:

Vikrama I	...	...	592 A. D.
„ II	...	...	733 A. D.
„ III	...	...	
Taila Bhupa, or Vikrama IV		...	973 A. D.
Vikrama V	...	...	1008 A. D.
„ VI	...	...	1076 A. D.

We should mention here that Vijnanesvara quotes from Medhatithi, who in his turn refers to Kumarila, the predecessor of Sankara, the great champion of the Brahmins against the Buddhists.[1] Sankara flourished in or about the eighth century. This fact shows that the first three Vikramas had not the remotest connection with the Mitakshara.

The name of Dharesvara, as I pointed out, quoted in the Mitakshara, leaves no doubt that Vijnanesvara flourished at the end of the eleventh century. Burnell and Bühler are also of the same opinion. The former says, that "Vijnanesvara most likely flourished in the eleventh century."[2] The latter is more emphatic. "The oldest writer with a known date," he says, "who quotes the Apastambiya Dharma Sutras is Vijnanesvara, who composed the Mitakshara, the well-known commentary on Yajnavalkya's Dharma Sastra, during the reign of the

[1] West and Bühler's Digest, p. 5.

[2] Pref. Dayabhaga, Mad.

Chalukya king Vikramaditya VI. of Kalyana, towards the end of the eleventh century."[1]

LECTURE VIII.

Aparārka.

The name of Apararka is well known. Quotations from his treatise are often found in standard legal works. Both Visvesvara Bhatta, and Devananda Bhatta, the author of the Smriti Chandrika, refer to him. He must have flourished, therefore, in the twelfth century of the christian era.

Account given by himself.

Let us see what information we can gather about him from his own work. He says, that "he was descended from Jimutavahana of the Vidyadhara race, the king of the Silaharas; that he was himself a king, who devoted himself to the pursuit of knowledge; that his treasury was full; and that he had able and devoted ministers in his service."

A member of the Silahara tribe.

This information, slight as it is, is enough to identify him as a member of the Silahara tribe. The origin of this tribe is hid in fable. It is said that the first king of this tribe was Jimutavahana, who laid down his own life to redeem that of a serpent, which was being devoured by the eagle Garuda, but was afterwards restored to life by him; whence the banner of the family bore the emblem of a golden eagle.[2]

The Silaharas.

The tribe of the Silaharas emigrated from Northern Affghanistan, where they originally dwelt, and found

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[1] Max Müller's Sacred Books of the East, Vol. II, Introd.

[2] Asiatic Researches, Vol. I; Royal Asiatic Society's Journal, Vol. II.

LECTURE VIII.

a new home in the Deccan. Here they established themselves by their bravery, and founded a powerful dynasty.[1]

The inscriptions relating to this tribe exhibit a series of eight or nine princes, commencing with Kapardi, the date of whose reign may be computed as about 900 A.C.; but they refer the remote lineage of the Silahara chiefs to Jimutavahana, raja of Tagara.[2]

Ramified into two families.

From land-grants referring to the Silahara sovereigns, it is clear that there were two branches of this dynasty, one reigning at Thana, and the other at Panala, near Kolapore. That reigning at Thana was the more ancient of the two branches. The Panala principality is supposed to have grown out of the wreck of that of Thana, which it long survived. The Silaharas claimed the title of lords of Tagara and rulers of Kankana. Jimutavahana, the founder of the Silaharas, governed, it is said, the whole region of Kankana, consisting of 1,400 villages, with cities and other places comprehended in many districts acquired by his arm. The descendants of Jimutavahana deriving their title from him proclaimed themselves as the rulers of Kankana. The Silahara princes were rulers of Kankana not in theory only, but they were also the actual sovereigns of the province. All the inscriptions mention them as ruling in Konkan, and we cannot for a moment doubt that they exercised sovereign authority in the Kankan a country.

[1] Lassen Indischen Alterthumkunde, Vol. III.

[2] Royal Asiatic Society's Journal, Vol. II.

It is not quite certain to which of these two branches king Aparaditya belonged. The published lists do not contain his name. He is not among the kings of the Panala branch, and the inscriptions belonging to the Thana branch do not go beyond 1027. It should be remarked, however, that these lists are very defective, and cannot be relied upon as exhaustive. As his name does not appear among the princes of the Panala branch, it is probable that he did not belong to this branch of the race. He very likely was a sovereign of the Thana branch of the family. If our conjecture is right, the absence of his name from the list of the Silahara sovereigns in the Panala branch need excite no wonder.

Their relation with the Chalukyas.

We have seen that the princes of the Chalukya dynasty often contracted matrimonial alliances with the Silahara family, and thus there was a close connection between the two reigning houses of the Deccan ; and the rulers of Kalyana were proud to boast of their connection with the Silahara kings.

Both the Chalukyas and the Silaharas were at the zenith of their power in the eleventh century. We find the Silaharas sometimes mentioned as tributary to the Chalukyas ; friendly relations also were always maintained between the two powers.

Vijnanesvara does not make any reference to Apararka's treatise ; nor does the latter, so far we have been able to ascertain, make the least mention of the Mitakshara. The doctrines propounded by

LECTURE VIII.

both the authors are often the same; but it does not appear whether the one borrowed from the other, or whether both of them were indebted to a common source for the principles they laid down. I showed to you that Vijnanesvara *borrowed largely* from Bisvarupa, but it is not certain whether Aparарka owed any of his doctrines to the teacher of Vijnanesvara. It is not probable that Vijnanesvara and Aparаrka were contemporary authors. There was an interval of nearly a hundred years between them. The reason why Aparаrka did not refer to Vijnanesvara, probably was that the former was a sovereign, and the latter only a minister of a sovereign. It is against Indian etiquette to make any public mention of the servant of a king, and to ignore the existence of his master. Both of them also codified the laws and customs of neighbouring and rival states; and as we believe they were not contemporaries, there was no necessity to refer to each other. In the case of contemporary authors who disagree in their doctrines, the general practice in all ages and countries is to refute the arguments of the rival teachers without mentioning their names. Aparаrka must have honored this general rule, although the interval between him and Vijnanesvara was nearly a century; and spared Vijnanesvara the shaft of his ridicule. In speaking of rival doctrines, we find Vijnanesvara using such uncourteous expressions as the "ravings of a mad man" in his Mitakshara;

Omission of the name of each from other's work accounted for.

but Apararka observes a more princely decorum, and seldom indulges in abuse. Apararka was a royal author; he would not care to notice the discrepancies between him and the servant of a neighbouring state.

Internal evidence as to Apararka's posteriority.

Internal evidence goes to show that Apararka was posterior to Vijnanesvara. There are unmistakable signs that Hindu society had reached a further stage of development in the time of Apararka. The language again had assumed a more modern form, and the difference both in grammatical structure and in style is clearly perceptible. And then again, although Apararka, in refuting rival doctrines, does not mention the name of Vijnanesvara, any careful observer would perceive that the name of the author of the Mitakshara is inseparably associated with them. Apararka seldom mentions the name of any of the authors of authoritative digests, and it is no wonder, therefore, that he should omit the name of Vijnanesvara.

Positive proof.

We have more positive proof that Apararka was posterior in point of time to Vijnanesvara. Two land-grants have been found, both of which are dated 1181 A. C. Both of them purport to be from Srimat Aparaditya Deva, the lord of Kankana. Both the grants say that the donor was of a very ancient lineage. Apararka styles himself as Srimat Aparaditya Deva of Silahara descent. Now we find that the Silaharas were rulers of Kankana in the twelfth century. We are led to believe that the subject of our notice and

LECTURE VIII. the donor of the grants were identical. It is true that Srimat Aparaditya Deva of the grants does not call himself as a Silahara sovereign; but it should be remarked that no genealogical details are given in the inscriptions. Had a full description of the donor's title been given, he would certainly have described himself as a descendant of Jimutavahana, the sovereign of the Silahara, the lord of Tagara, the ruler of Kankana. The inscriptions we refer to are *very short*, and there was apparently no room to make any flourish about the genealogy and the high-sounding titles of the donor. The land granted was situated in Kankana, and it was enough, therefore, that the donor should style himself "lord of Kankana," and thus should establish his own title to the piece of land given away. Here there was no necessity for the donor to give his lineage. He was called upon to prove his own right to the "piece of ground situated in the grant of Thadda, in the village of Mandowley," and he did so by giving simply his official designation "the lord of Kankana." Had the inscription been a long one, all the other genealogical details would certainly have been given.

There is no doubt in our mind, therefore, that Srimat Aparaditya Deva of the grants and the author of the Digests known by his name are one and the same person.[1]

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[1] Asiatic Researches, Vol. II and Vol. V.

The date of the grants is 1181, but King Apararka must have composed his work long before this time. We find Devananda Bhatta, the author of the Smriti Chandrika, quoting from him as from a contemporary author, and we also find that Bisvesvara Bhatta, the author of Madana Parijata, referring to him, towards the end of the twelfth century, as to a standard authority. This makes it at least very probable that Apararka's great work was promulgated in the first half of the twelfth century.[1]

LECTURE VIII.

His work published in the first half of the twelfth century.

From the data already given, it is easy to fix the date of Smriti Chandrika. The author gives us no account of himself in his work. He merely tells us that his name was Deva, or Devananda Bhatta, and that his father's name was Kesavaditya. It is conjectured that he was a native of Southern India. Nothing, however, is known about his antecedents. "Of the author of Smriti Chandrika," says Sir Thomas Strange, "little, if anything, seems to be known. The work attributed to him was compiled during the existence of the Vidyanagara dominion (an extensive southern empire), that flourished during the thirteenth, fourteenth, and fifteenth centuries of our era; but apparently not under the direct sanction of the Government. It has been considered by Mr. Colebrooke to be a work of uncommon excellence, if not superior in point of research and copiousness of disquisition to the Madhavya."

Devananda Bhatta.

Author of Smriti Chandrika.

[1] See Indian Atiquary, February, 1880, pp. 39—42.

Lecture VIII.

Opinion that he flourished during the existence of Vidyanagara dominion controverted.

It does not seem to us to be probable that the Smriti Chandrika "was compiled during the existence of the Vidyanagara dominion." Madhavacharya, the great minister of the first three sovereigns of the Vidyanagara kingdom, would never have cited as an authority any work which was "apparently not under the direct sanction of the Government."

If we believe the statement that the author of the Smriti Chandrika flourished during the existence of the Vidyanagara dominion, we cannot but admit that he was a contemporary of Madhacharya, one of the founders of that dominion. Is it possible that the great minister, the great Vidyaranya (forest of learning), who took under his service almost every literary man distinguished in any branch of knowledge, would condescend to cite as an authority an obscure individual who must, under this supposition, have incurred royal displeasure? Madhava would have been the first to discern the merits of an author who could produce a work of uncommon excellence. Had Devananda been a contemporary of Madhava, the great man, who was a patron of learning, and who was himself ambitious of literary renown, would at once have marked Devananda as his own, and swelled his literary prestige by stamping Smriti Chandrika with his own name.

His date the middle of the 12th century.

The fact is, the author of Smriti Chandrika flourished a little earlier, and Madhava had no opportunity to press him into his service. Smriti Chandrika

quotes from Dharesvara (9), Visvarupa (44), Vijnanesvara (44), Apararka (24), and no later author; and we have seen that Madhava cites him as an authority. There can be no other alternative, therefore, but to place our author between the middle of the twelfth and the beginning of the fourteenth century. Bisvesvara Bhatta, the author of Madana Parijata, mentions Smriti Chandrika as one of the works which he consulted. This would give us the middle of the twelfth century as the date of Devananda Bhatta, whose work is "of great and paramount authority in the countries occupied by the Hindu nations of Dravira, Tailangana, and Karnata inhabiting the greatest part of the Peninsula or Deccan."[1]

Bisvesvara Bhatta.

I will now place before you the evidence which I have been able to collect about the exact age of Bisvesvara Bhatta. Bisvesvara composed his work —Madana Parijata—by the command of Madanapala, and named it after his patron. Madanapala was of the Jata race, and was the ruler of Kashtha on the banks of Jamuna. The genealogical details given both in Parijata and Madana Vinoda, which is also ascribed to Madanapala, are as follows: Madanapala and his elder brother Sahajapala were fifth in descent from Ratnapala, their common ancestor. They were the great grandsons of Bharatapala, grandsons of Harischandra, and sons of Sadharana.

[1] Colebrooke's Dayabhaga, Preface.

LECTURE VIII.

His work Parijata composed towards the close of the 12th century.

As the genealogical details given in the two works literally agree in every point, it is perfectly clear that the patron of Bisvesvara and the author of Madana Vinoda were identical. Now the author of Madana Vinoda says that this work was finished in 1231 Sambat, corresponding to 1175 A. C.[1] This being the date of Madana Vinoda, there can be no question that the Parijata was composed at the end of the twelfth century.

Colebrooke's erroneous computation of date.

Here, with all due deference, we would point out an error into which Colebrooke was led in stating that Madana Vinoda was dated in the fifteenth century of the Sambat era.[2] The mistake arose in interpreting the word *Yuga*, which may mean either 2 or 4. He took it to be 4, and apparently thought that the date of the work was 1431, corresponding to 1375 A. C. By a comparison of the quotations from the Parijata in subsequent works, whose dates are ascertained, it will appear that we cannot give such a late date to Madana Vinoda. Chandesvara, the author of Vivada Ratnakara, often quotes from Parijata and Kalpataru. The former, therefore, was subsequent to Parijata. Chandesvara, as we

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1 अब्दे ब्रह्मजगद्युगेन्दुगणिते श्रीविक्रमार्कं प्रभोः
माघे मासि वलक्षपक्षधवले षष्ठ्यां सुधांशोर्दिने, ।
दीनानां परितापपापदलनो ग्रन्थं निघण्टुं व्यधात्
श्रीभूपो मदनो निवन्धचतुरः सच्चक्रचूडामणिः ॥

2 Preface to Dayabhaga and Mitakshara.

will show, flourished at the beginning of the fourteenth century. He could not, therefore, have quoted from an author who lived at the *end* of the fourteenth century. Chandesvara refers again to Lakshmidhara, the author of Kalpataru. Nrisinha, a contemporary of Lakshmidhara, quotes from Bisvesvara. The distance of time, therefore, between Bisvesvara and Chandesvara could not have been less than a hundred years at least. If all these facts be taken into consideration, we cannot affirm that Madana Vinoda was written in 1431 Sambat, but must take *Yuga* to mean 2, and fix 1231 Sambat as the date of Madanapala's work.

Lakshmidhara, author of Kalpataru

Lakshmidhara, the author of Kalpataru, must be placed between Chandesvara (1314 A.C.) and Madhava (1361—1375). Nrisinha, a contemporary of Lakshmidhara, cites Madhava as an authority; and Chandesvara, in his Vivada Ratnakara, often quotes the opinions of Lakshmidhara,[1] and cites passages from Kalpataru[2] to support his views. I will presently give you a few more facts regarding the life and writings of Lakshmidhara.[3]

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[1] Sanskrit College MS., p. 305.

[2] *Ibid.* 333.

[3] Dr. Rajendralala Mitra is of opinion that Kalpataru, " a Smriti compilation on the duties, feasts, and observances meet for householders, was written by Lakshmidhara under the auspices of the King Govinda Chandra Deva of Kanauj" (Sanscrit Manuscripts of the Maharaja of Bikaner, p. 406). Govinda Chandra of Kanauj flourished about 1120—1125 A.C. (Colebrooke's Essays, Vol. II, p. 253). This would make Lakshmidhara an author of the 12th century. According to Colebrooke, however,

LECTURE VIII.

Pratapa Rudra, author of Saraswati Vilasa.

Saraswati Vilasa is one of the works of paramount authority in the territories dependent on the Government of Madras. The work is attributed to Pratapa Rudra Deva, one of the princes of the Kakateya dynasty of Warangal.

"Pratapa Rudra," we read, "in the early part of his reign, was, no doubt, a prince of power, although tradition ridiculously exaggerates its extent. He is said to have reigned from the Godaveri to Rameshwara, and to have carried his arms into Hindustan as far as *Prayaga*, or Allahabad. The territories over which he reigned appear to have extended across the Peninsula between the fifteenth and the eighteenth degrees of latitude, being checked on the north-east by the Ganapati Raja of Orissa, and on the north and north-west by the Rama Raja of Devagiri, whilst on the south, the Ballala Raja and the remains of the Chola sovereignty checked his progress in that direction. A more formidable enemy, however, now appeared on the scene, for whom even the Raja of Warangal was not a match.

"According to the traditions of the South, a Mahomedan chief, it does not appear of what State, and the Cuttack Raja, being alarmed by the power and ambi-

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Lakshmidhara composed his work "by command of Govinda Chandra, a king of Kasi." By command of the same prince Nrisinha composed a law tract entitled *Govindarnava* (Colebrooke's Digest, Preface). Nrisinha, as I have shown, quotes from Madhavacharjya, a lawgiver of the 14th century. If Colebrooke's opinion then be accepted as correct, Lakshmidhara is not an author of the 12th century.

LECTURE VIII.

tion of Pratapa Rudra, applied to Delhi for aid. An army was sent to their assistance, and besieged Warangal, but was totally defeated. Warangal, however, fell at last, and Pratapa Rudra was taken and carried prisoner to Delhi. The Mahomedan historians confirm these occurrences generally, and place them in 1323, which date agrees well enough with the Hindu chronology as derivable from Pratapa Rudra's inscriptions. After a short interval, the Delhi Sultan, it is said, gave Pratapa Rudra his liberty, and he returned to Warangal, where he shortly afterwards died."[1]

Ferishta confirms this account. We find that the Prince Aluf Khan, in the reign of Gheias-ud-din Toghluk, besieged Warangal in 1322, and reduced it to surrender. "Some thousands of Hindus were put to death, and Luddur Dew (Rudra Deva) with his family were taken prisoners. Aluf Khan sent them, together with their treasures, elephants, and private property, to Delhi. Upon their reaching the capital great rejoicings were made in the new citadel at Delhi."[2]

Chandesvara, author of Vivada Ratnakara, contemporary of Pratapa Rudra.

It is thus quite clear that Chandesvara, the reputed author of Vivada Ratnakara, and Pratapa Rudra, the reputed author of Saraswati Vilasa, were contemporaries. But one was a native of Mithila,

[1] Wilson's Mackenzie Collection, Vol. I, pp. 132, 133.
[2] Ferishta, Vol. I, p. 405.

LECTURE VIII.

in Northern Hindustan, and the other was a king in the extreme south of the Peninsula.

We come now to Vivada Ratnakara. Chandesvara, the reputed author of this work — a great authority in the Mithila School—was the minister of Hara Sinha Deva, the king of Mithila. Chandesvara says in his work that "he was a minister of the conqueror of Nepal; that, in the year 1236 Saka, he performed seven times, on the banks of the river Vagvati, north of Somanatha, the solemn religious rites known as *the cotton effigy*, and presented hoards of gold and silver to the needy and the deserving; that he was the author of several treatises, entitled Kritya Ratnakara, Dana Ratnakara, Vyavahara Ratnakara, Suddhi Ratnakara, Puja Ratnakara, and Vivada Ratnakara; that, when composing Ratnakara, he consulted Kalpadruma, Parijata, Halayudha, Prakasa, and other works; and that he was the son of Viresvara."[1]

Flourished at the beginning of the 14th century.

This account is enough to fix the date of Vivada Ratnakara. He performed, he tells us, a solemn re-

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[1] श्रीचण्डेश्वरमन्त्रिणा मतिमतानेन प्रसन्नात्मना
नेपालाखिलभूमिपालजयिनो धर्म्मैन्द्दुग्धाब्धिना ।
वाग्वत्याः सरितस्तटे सुरधुनीसाम्यं दधत्याः शुचौ
मार्गेमासि यथोक्तपुण्यसमये दत्तस्तुलापूरुषः ॥
रसगुणभुजचन्द्रैः सम्मिते शाकवर्षे
सहसि धवलपक्षे वागतीसिन्धुतीरे ।
अदित तुलितमुच्चैरात्मना स्वर्णराशिं
निधिरखिलगुणानामुत्तरं सोमनाथात् ॥

ligious ceremony on the banks of Vagvati in 1236 Saka, corresponding to 1314 A. C. He flourished then at the beginning of the fourteenth century. LECTURE VIII.

Facts in proof cited.

This date tallies with the other historical facts we know regarding Chandesvara. He was, as I told you, the minister of Hara Sinha Deva, the king of Mithila. Hara Sinha Deva, we read, "was compelled by the Patan sovereign of Delhi to abandon his capital, and take refuge in the Hills. When Simroun was destroyed by Toghlikh Shah, in the year of Christ 1323, Hara Sinha Deva became its Raja."[1]

Turning now to Ferishta, we find that as the King Gheias-ud-din Toghluk was passing near the hills of Tirhut (Mithila) on his return from Bengal, the Raja appeared in arms, but was pursued into the woods. "Finding his army could not penetrate them, the king alighted from his horse, called for a hatchet, and cut down one of the trees with his own hand. The troops on seeing this applied themselves to work with such spirit that the forest seemed to vanish before them. They arrived at length at a fort surrounded by seven ditches full of water and a high wall. The king invested the place, filled up the ditches, and destroyed the walls in three weeks. The raja and his family were taken, and great booty obtained, while the Government of Tirhut was left in the hands of Ahmed Khan, the son of Mullick

[1] P. C. Tagore's Vivada Chintamani, Preface.

LECTURE VIII. Tubligha, after which the king returned towards Delhi."[1] This was in the year 1325.

This account of Ferishta gives us some idea of the troubles into which the state of Mithila had fallen in the beginning of the fourteenth century. This was the time when Hara Sinha Deva was on the throne.

The name of Hara Sinha is still cherished with affection in Mithila. He was the Ballala Sena of Tirhut. He divided the Brahmins and Rajputs into different classes, and this classification is still observed. The large tanks and other public works of Hara Sinha Deva still attest his public spirit and liberality. He is in a large measure indebted for his fame to his able and renowned minister Chandesvara, the author of Vivada Ratnakara.

The present Darbhangah family trace their origin to one Mahesh Thakur, who, in the beginning of the sixteenth century, took service as a *purohit*, or priest, under the ancient rajas of Tirhut — the descendants of Sheo Sing.[2] The dynasty of Sheo Sing, it is well known, followed that of Hara Sinha Deva, and was succeeded in its turn by the Darbhangah dynasty. By counting the different generations of kings, we can easily determine by calculation the date of Hara Sinha, and place him in the beginning of the fourteenth century. This corresponds with the date given

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[1] Brigg's Ferishta, Vol. I, p. 407.

[2] Hunter's Statistical Account of Bengal, Vol. XIII, p. 208.

in Vivada Ratnakara. There can be no doubt, therefore, about the age of Chandesvara, the author of Vivada Ratnakara. LECTURE VIII.

We should not omit to mention that the river Bagvati, or Bagmati, referred to by Chandesvara, rises in Nepal, near Katamandu, and enters Tirhut near Maniari Ghat in the Sitamari Subdivision. The current is very swift, sometimes running seven miles an hour. There are many snags, which render navigation dangerous. A former bed, known as the old Baghmati, is still pointed out. This bed has steep banks, is about fifty yards wide, and carries a good volume of water in the rains. The Baghmati, being a hill-stream, rises so quickly after heavy rain, that its banks are unable to contain the water, and immense damage is done when the bank is once overtopped.[1]

We learn from Vivada Chandra, which also is much respected in the Mithila School, that the father of Hara Sinha was Sunusara, and the name of his grandfather was Bhabesa. Darpanarayana was the son of Hara Sinha; and the son of Darpanarayana was called Chandra Sinha. Lakshmi Devi was his queen.[2] The name of Chandra Sinha is not *Lakshmi Devi.*

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[1] Hunter's Statistical Account of Bengal, Vol. XIII, p. 23.

[2] अभूदभूतपतिमल्लगन्धो राजा भवेशः किल सार्व्वभौमः ।
अत्याजयद्यो वङ्गभर्त्तुः कत्त्वं दोषं भुवोऽपि प्रभुरग्र्यधामा ॥
तस्मादनूनोऽजनि सूनुसारो धीमानुमासूनुसमानसारः ।
राजोपजीव्यो हरसिंहनामा ततोऽन्वतो दर्पनरायणोऽभत् ॥

LECTURE VIII.

expressly mentioned in some manuscript copies of Vivada Chandra, while in others his name is given in unmistakable terms. The epithets which are given in mentioning the son of Darpanarayana, leave no doubt that Chandra Sinha is meant by them.[1]

Lakshmi Devi, we further learn, composed the work called Vivada Chandra, and set the name of Misaru Misra, her nephew, to her composition. All her works on law and philosophy bear the name of Misaru Misra. The title of her work Vivada Chandra was taken from the reigning prince Chandra Sinha, her husband.

Composed her work, Vivada Chandra, towards the close of the 14th century.

Vivada Chandra then was written during the reign of a grandson of Hara Sinha, who, we have seen, flourished in the beginning of the fourteenth century. The author of Vivada Chandra, therefore, must have composed her work towards the end of the fourteenth century.

Vachaspati Misra.

The genealogical details given in Vivada Chandra are continued in Vyavahara Chintamani by Vachaspati Misra. Vachaspati Misra is the author also of Vivada Chintamani, the well-known text-book of the Mithila School. We find from Vyavahara Chintamani that, besides Chandra Sinha, Darpanaryana

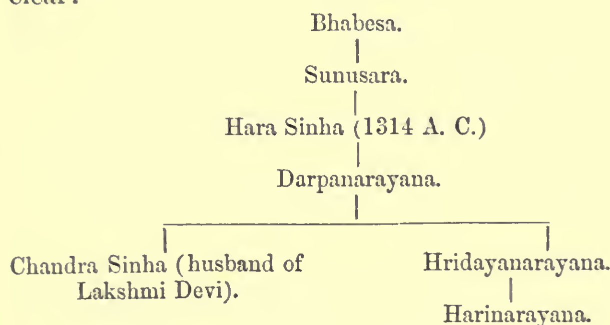
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दर्पनरायणनृपतेः श्रीमद्धीरा महादेवी ।
अलभत सुनयं तनयं नरपतिगणराशिपूरितं शूरम् ॥
श्रीमल्लखिमादेवी तस्य च नृपते र्दयितस्य ।
मिशरुमिश्रद्वारा रचयति विवादचन्द्रमभिरामम् ॥

[1] Colebrooke's Digest, Preface.

had another son named Hridayanarayana; and Harinarayana was the son of Hridayanarayana, and the fourth in descent from Hara Sinha.

The following genealogical table will make this clear:



Wrote Vivada Chintamani about the beginning of the 15th century.

Vivada Chintamani, therefore, must have been composed in the beginning of the fifteenth century. We find in Vivada Chintamani quotations from Mitakshara,[1] Halayudha (235),[2] Parijata (235), Kalpataru (26), and Ratnakara (Introd.) Independently then of the date found above, we could, from the reference to these authors in Vivada Chintamani, have fixed the beginning of the fifteenth century as the time when Vachaspati Misra composed his treatise.

[1] P. C. Tagore's Vivada Chintamani, 138.

[2] Halayudha was the spiritual adviser and the prime minister of Lakshmana Sena, the king of Bengal, who, it is well known, was deposed by Bakhtiyar Khilijy. We read in Ferishta that "the first Moslem chief who invaded the kingdom of Bengal was Mullick Mahomed Bukhtiyar, in the reign of Kootub-u-din Eibak, king of Delhi, in the year 587 A. H. (1191 A. C.) [Brigg's Ferishta, Vol. IV, p. 328.] Lakshmana Sena gave his name to an era of which 776 years are now expired; so that this era must have taken its start from 1104 A. C. Halayudha, therefore, must have flourished in the middle of the twelfth century. He was the author of several learned works on law, philosophy, and grammar.

LECTURE VIII.

Colebrooke, writing in 1796, said, that "no more than ten or twelve generations had passed since Vachaspati Misra flourished at Semaul in Tirhut." Giving from twenty to thirty years to each generation, we also arrive by a sort of rough calculation at the beginning of the fifteenth century as the age of Vachaspati Misra.

Jimutavahana, author of Dayabhaga

The earliest writer with a known date who quotes from the Dayabhaga of Jimutavahana is Raghunandana. Raghunandana flourished in the beginning of the sixteenth century.

Jimutavahana refers to Bhojadeva,[1] who, we have shown, flourished in the middle of the eleventh century.

The age of Jimutavahana, then, ranges between the middle of the eleventh to the beginning of the sixteenth century.

It is the general opinion that the earliest commentary on Jimutavahana is that of Srinatha.[2] Srinatha says, that he was the son of Srikara. This Srikara must not be confounded with the jurist of the same name referred to by Vijnanesvara in his Mitakshara. The name of the modern Srikara also is highly esteemed in Mithila. Srikara, the father of Srinatha, has also written a treatise on Inheritance. He quotes from Jimutavahana in this treatise. This reference brings Jimutavahana to the middle of the fifteenth century.

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[1] Dayabhaga, XI, 2. 22; XI, 2. 29.

[2] Colebrooke's Dayabhaga, Preface.

Jimutavahana quotes from Govinda Raja's Commentary on Manu.[1] This commentary on Manu is a standard work, and is often quoted. Kalluka Bhatta made large use of it in his gloss. There was a king of Kasi, named Govinda Raja, who was a great patron of learning. "Considering," says Nrisinha, his biographer, "that life is short and unstable as a drop of water on a lotus leaf, he determined to leave such a work behind him as would make his name immortal in the three worlds. He invited learned men from all parts of the country, and requested them to compose works on law and philosophy." Lakshmidhara, by his command, composed Kalpataru, and Nrisinha, his biographer, was the author of Govindarnava, a treatise on ceremonial law. It is probable that the commentary on Manu, which is attributed to Govinda Raja, and which is referred to by Jimutavahana, was composed during the reign of Govinda Chandra, the king of Kasi, and being dedicated to him was stamped with his name.

Now Nrisinha, a contemporary of Govinda Raja, quotes from Madhavacharya, who flourished in the fourteenth century. We have seen that Madhavacharya composed his treatise on Inheritance at the the end of the fourteenth century, during the reign of King Bukka of Vijayanagara. This then brings Jimutavahana to the beginning of the fifteenth century.

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[1] Dayabhaga. XI, 2. 23 : XI, 2, 29 .

LECTURE VIII.

The commentators of Jimutavahana are of opinion that the author of the Dayabhaga often refers to and recites the doctrines of Chandesvara and Vachaspati Misra.[1] The doctrines refuted are found in the authors mentioned above, and a critical examination of the passages referred to would show that Jimutavahana must have had before him the treatises of Chandesvara and Vachaspati Misra, when he cited their doctrines. In fact Vachaspati Misra is distinguished by his family name of *Misra*, and "Misra" is often cited in the Dayabhaga.

The freedom again with which Jimutavahana discusses the doctrines of the author of Vivada Chintamani shows that Vachaspati Misra and Jimutavahana were contemporaries, and that the former composed his treatise only a few years before the founder of the Bengal School composed his immortal work.

The doctrines of Vijnanesvara and those of the teachers of the Mithila School must have been widely prevalent in Bengal, when Jimutavahana undertook to refute their doctrines, and conclusively proved that the principles laid down by the teachers of Benares and Mithila were not applicable in Bengal. He attempted to show that the interpretation which those teachers put upon the texts of the mediæval sages was *not* correct, and the principles deduced by them from those texts do not logically flow from them.

[1] Dayabhaga, Book II, 27; IV, 3, 23; XI, 1, 14; XI, 4, 3.

The reasoning of Jimutavahana has been violently attacked by the adherents of the Northern Schools, but the arguments of the founder of the Bengal School have not in any way been shaken by them. Jimutavahana stands firm in his position. The other teachers cite precedents and authorities in support of their views ; but Jimutavahana appeals to reason, and thus has a great advantage over them. The Dayabhaga well sustains the reputation of Jimutavahana as a great jurist unrivalled in his powers of reasoning.

His age assigned to the beginning of the 15th century.

You may view Dayabhaga from any point you please, you cannot avoid coming to the beginning of the fifteenth century as the age of Jimutavahana.

Raghunandana, beginning of the 16th century.

It is easy to fix the age of Raghunandana, the great lawgiver, after we have ascertained the date of Jimutavahana, the founder of the Bengal School. Raghunandana, and Chaitanya, the founder of Vaishnava religion, were contemporaries. They were disciples of the same preceptor. Both of them were residents of Navadwipa in Bengal. Raghunandana was the son of Harihara of Bandyaghati, a village near Navadwipa. The horoscope of Chaityana gives 1411 Saka, corresponding to 1489 A. C., as the year in which he was born. Raghunandana also has in some of his treatises given the date in which those works were finished. Raghunandana is still honored by the proud name of *Smarta Bhattacharya*, or *the* great professor of law. His fame, as one of the greatest

LECTURE VIII.

lawgivers of Bengal, has spread far and wide, and in ceremonial law his authority is universally respected in Bengal. The *eighteen tatwas*, or treatises, of Raghunandana are in the hands of every Bengal *pandita* having the least pretension to a knowledge of law. It is fortunate that the age of Raghunandana has been fixed with the utmost precision. He flourished, as we pointed out, at the beginning of the sixteenth century.

Mitra Misra, about the end of the 16th century.

As Raghunandana is respected in Bengal, so Mitra Misra, the author of Vira Mitrodaya, is esteemed in the Benares School. Mitra Misra was ths son of Parusurama, and the grandson of Hansa. The work was composed under the auspices of Maharaja Vira Sinha, the son of Madhukara Saha, and the grandson of Pratapa Rudra. He refers to Vijnanesvara (15), Apararka (230), Smriti Chandrika (237), Parijata (102), Madhava (84), Vivada Ratnakara (82), Vivada Chintamani (82), Dayabhaga of Jimutavahana (2), and Raghunandana (15). These references bring him to the middle of the sixteenth century. We incline to the opinion, therefore, that he must have flourished towards the end of the sixteenth or the beginning of the seventeenth century.

Nanda Pandita, author of the Dattaka Mimansa. A.C. 1633.

The date of Nanda Pandita is also beyond question. He tells us in his celebrated commentary on Vishnu, entitled " Kesava Vaijayanti," that " he was the son of Ram Pandita of Benares. The work was

finished in 1689 Sambat,[1] under the auspices of Kesava Nayaka, son of Maharaja Kandeya Nayaka, descended from Bharadwaja's stock." This would give the year 1633 A.C. as the date of the commentary on Vishnu.

The founder of the family of Nanda Pandita, we learn from Mandalik's valuable work on Hindu Law, was Lakshmidhara, a resident of Bedar. He settled in Benares. Nanda Pandita was sixth in descent from him. Persons belonging to the ninth generation after Nanda Pandita are still flourishing in Upper India. We also learn that, in an old copy of Madhavananda, a poetical work of Nanda Pandita, which bears notes believed to be in the author's handwriting, the year 1655 Sambat (1599 A.C.) is given.[2]

All these facts conclusively show that our author flourished in the middle of the seventeenth century.

Nanda Pandita, it should be remembered, is the author of an excellent treatise on Adoption, entitled Dattaka Mimansa. He is also the author of a commentary on the Mitakshara of Vijnanesvara. The name of Nanda Pandita is much esteemed in the Benares School.

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[1] वर्षे विक्रमभास्करस्य गणिते नन्दाङ्कषड्भूमिभिः
पूर्णे कार्त्तिकमासि वृश्चिकगते भानौ वृषस्थे विधौ ।
काश्यां केशवनायकस्य नृपतेराज्ञामवाप्य स्मृते
र्विष्णोर्व्याकृतिमाचकार विमलां श्रीनन्दशर्मा सुधीः

[2] Introduction, 72.

LECTURE VIII.

Balam Bhatta, middle of the 17th century.

Lakshmi Devi, who took the cognomen of Balam Bhatta, is the author of a commentary on the Mitakshara. She tells us that her husband's name was Vaidyanath, and she was the mother of Nalakrishna. She cites passages from Kalpataru, Ratnakara, Vachaspati Misra, Kaustubha, and others, and impeaches the doctrines of Nanda Pandita. She must have, therefore, flourished towards the end of the seventeenth century.

Kamalakara, author of the Nirnaya Sindhu, 1612 A.C.

We will now come to Kamalakara, the author of Nirnaya Sindhu and Vivada Tandava. Both these works are of very high authority in the Northern, Western, and Southern Schools. We are not left in the dark about the age of Kamalakara. He tells us himself in his work, called Nirnaya Sindhu, that he was the great grandson of Rameswara Bhatta, grandson of Narayana, son of Ramakrishna, and the younger brother of Divakara ; and that his work was finished in 1668 Sambat :[1] this corresponds to 1612 A.C. Nirnaya Sindhu treats of ceremonial law, and is of considerable importance at Benares and among the Marhattas. Vivada Tandava is one of the text-books of the Benares School. Kamalakara was a follower of Vijnanesvara.

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[1] वसुऋतुऋतु भूमिते गतेऽब्दे
नरपतिविक्रमतोऽथयाति रौद्रे ।
तपसि शिवतिथौ समापितोऽयं
रघुपतिपादसरोरुहेऽर्पितश्च ॥

Nilakantha, author of Vyavahara Mayukha, 17th century.

We hear of Vyavahara Mayukha as a work of great authority in the Maharashtra School. Mr. Colebrooke says, that, "in the west of India, and particularly among the Mahrattas, the greatest authority after the Mitakshara is Nilakantha, author of the Vyavahara Mayukha and of other treatises bearing the same title." At the conclusion of Vyavahara Mayukha, the author says that he composed his work under the auspices of Bagavanta Deva, who bore the title of Sangara Raja. It has been found on enquiry[1] that at Bhareh, a town situated at the confluence of the Chambal and Jamna, a raja bearing this title held his court, and took our author under his protection. Nilakantha, out of gratitude, gave the name of his patron to the work composed under his auspices. The twelve treatises, of which Nilakantha was author, were collectively styled by him as Bhagavanta Bhaskara. Nilakantha tells us in his preface that he prosecuted his studies under his father Sankara Bhatta of Benares, who was the author of a celebrated treatise on Mimansa, called *Dwaita Nirnaya*. We read that his descendants lived at Puna about sixty years ago.

The descendants of Nilakantha believe that he flourished about 250 years ago. This information seems to be quite correct. Its authenticity may be proved from internal evidence. Nilakantha quotes

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[1] Stokes's Hindu Law Books, p. 8.

LECTURE VIII. from Vijnanesvara,[1] Smriti Chandrika (84), Madhava (84), Kalpataru (66), Vivada Ratnakara (121), Vachaspati Misra (41), and Smarta Bhattacharya (41). We have seen that the cognomen *Smarta Bhattacharya* belonged to Raghunanda of Nuddea, who, I showed you, flourished at the beginning of the sixteenth century. Nilakantha, therefore, must have flourished in the seventeenth century. This statement derives additional support from the fact, that neither Mitra Misra, nor Kamalakara, ever cites him as an authority; and the absence of any reference to him in their works can only be accounted for by the fact that he must have flourished either a little before them, or was contemporary with them. Nilakantha, therefore, was a modern author, and must on no account be placed side by side with Vijnanesvara, Aparарka, and the other hoary-headed sages of antiquity.

The information collected by Pandit Bal Sastri of Benares confirms this statement. We learn that Kamalakara and Nilakantha were cousins. Narayana had two sons, Ramkrishna and Sankara. The former was the father of Kamalakara and the latter of Nilakantha. Persons sixth in descent from both the cousins are now living in Benares.[2] Both Kamalakara and Nilakantha refute the doctrines of Nanda Pandita. The fact is, all these three authors must have been contemporaries.

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[1] Stokes's Hindu Law Books, 51.

[2] Mandalik's Hindu Law, Introduction, 76.

Lecture VIII.

Srikrishna Tarkalankara, early period of the 18th century.

Srikrishna Tarkalankara, whose Dayakrama Sangraha and commentary on the Dayabhaga are standard works in the Bengal School, may appropriately be placed after Nilakantha. Great grandsons of Srikrishna were living in 1806; and his grandson (daughter's son) was alive in 1790. He must have lived, therefore, in the first part of the eighteenth century.

To sum up:

Summary.

The Hindu Law is divided into five schools, *viz.*, the Mithila, the Benares, the Dravira, the Bengal, and the Maharashtra Schools.

Of these the Mithila School seems to be the oldest, though we cannot point to any Mithila authority who is of undoubted antiquity, and whose age can be proved to be anterior to that of Vijnanesvara. Vijnanesvara speaks of a Northern and a Southern School existing in his time. It seems to us that the Northern School spoken of was the Mithila School represented by Srikara, and the Southern School was the Dravira School founded by Medhatithi and his followers. It would thus appear that the Mithila School and the Dravira School were older than the Benares School founded by Vijnanesvara. Yajnavalkya promulgated his code of laws at Mithila; and it is natural to suppose that the study of law was cultivated in this province, since the time of Yajnavalkya, with great enthusiasm and earnestness; and it thus became the centre from which the prin-

LECTURE VIII. ciples of Hindu Jurisprudence were disseminated to other parts of the country. Mithila was a seat of learning long before the names of Kanchi, Kalyana, Kasi, or Gaura were heard of. Learned men from all parts of India flocked to Mithila to study the science, and we can easily imagine how, in course of time, when these students carried to different provinces the principles which they learned at Mithila, local differences modified the original juridical principles. The names of all the ancient Mithila authorities are lost to us. The name of Srikara alone survives to bear witness to the antiquity of this School. The name of Srikara must have been of very wide celebrity, or else the teachers of the different schools would not have taken so much trouble to refute his opinions. Srikara, however, seems to us, as we stated before, to be posterior to Medhatithi, the founder in all probability of the Dravira School.

It would thus appear that the Mithila and the Dravira Schools were anterior to the Benares School. The Benares School, however, is the most important of all the other schools. The Mitakshara, the text-book of this school, is the great source from which all the other schools, as they exist at the present day, have drawn their inspiration. The Mitakshara is the basis of modern Hindu Law; and Vijnanesvara is the great Gamaliel sitting at whose feet the authors of Smriti Chandrika, Vivada Ratnakara, and Jimutavahana lisped their law.

We subjoin the names of the standard works on Inheritance which are esteemed as great authorities in the several schools :— LECTURE VIII.

Benares School.

Mitakshara by Vijnanesvara.

Subodhini (a commentary on the Mitakshara) and Madana Parijata by Visvesvara Bhatta.

Commentary on the Parasara Smriti by Madhava Acharya.

Kalpataru by Lakshmidhara.

Vivada Tandava by Kamalakara.

Keshava Vaijayanti, and a Commentary on the Mitakshara by Nanda Pandita.

Vira Mitrodoya by Mitra Misra.

A Commentary on the Mitakshara by Lakshmi Devi, better known as Balam Bhatta.

Dravira School.

Mitakshara.

Smriti Chandrika by Devananda Bhatta.

The Commentary on Parasara Smriti by Madhava Acharya.

Saraswati Vilasa attributed to Pratapa Rudra Deva.

Vyavahara Nirnaya by Varada Raja.

Mithila School.

Mitakshara by Vijnanesvara.

Vivada Ratnakara by Chandesvara.

Vivada Chandra by Misaru Misra, or Lakshmi Devi.

Vivada Chintamani by Vachaspati Misra.

LECTURE VIII.

Bengal School.

Dayabhaga by Jimutavahana.

Dayatatwa by Raghunandana.

Dayakrama Sangraha by Srikrishna Tarkalankara.

The Commentaries on the Dayabhaga by Srinatha, Achyuta, Raghunandana, Mahesvara, Srikrishna, and Rambhadra.

Jagannatha's Digest.

Maharashtra School.

Mitakshara.

Vyavahara Mayukha by Nilakantha.

The Commentary on Parasara Smriti by Madhava Acharya.

We subjoin also the names of the principal legislators, whose authority is respected in the different schools, in order of their respective ages :—

General

1. Medhatithi.
2. *Srikara.*
3. Dharesvara.
4. Visvarupa. (Benares School.)
5. Vijnanesvara (latter half of the 11th century). (General.)
6. Apararka (12th century). (Dravira School.)
7. Devananda Bhatta (author of Smriti Chandrika).
8. Visvesvara Bhatta (latter half of the 12th century). (Benares.)
9. Madhava Acharya (14th century). (Benares. Bombay. Madras.)
10. Lakshmidhara (author of Kalpataru). (Benares.)
11. Chandesvara (1314) [author of Vivada Ratnakara]. (Mithila.)

Pratapa Rudra, the reputed author of Saraswati Vilasa (beginning of the 14th century).[1] LECTURE VIII. Dravira.

12. Vivada Chandra by Misaru Misra. Mithila.

12*a*. Vachaspati Misra (author of Vivada Chintamani). Mithila.

13. Jimutavahana (15th century). Bengal.

14. Raghunandana (beginning of the 16th century). Bengal.

14*a*. Varada Raja (end of the 16th century).[2] Dravira.

15. Mitra Misra (beginning of the 17th century). Benares.

16. Nanda Pandita (1599—1633). Benares.

17. Kamalakara (1612). Benares.

18. Nilakantha (author of Vyavahara Mayukha). Maharashtra.

19. Lakshmi Devi, *alias* Balam Bhatta Benares.

20. Srikrishna Tarkalankara (beginning of the 18th century). Bengal.

21. Jagannatha (latter end of the 18th century). Bengal.

Besides these great authorities, the commentaries on Manu by Govinda Raja and Kalluka Bhatta, and the commentary on Yajnavalkya by Sulapani, are highly esteemed in the several schools.

It is particularly to be noted that the Vira Mitrodaya of Mitra Misra has been declared by the Privy Council to be "a treatise of especial authority at Benares."[3] "Their Lordships have no doubt that the Vira Mitrodaya, which by Colebrooke and others

Benares School.

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[1] Wilson's Mackenzie Collection, Vol. I, Introduction, 132.

[2] Burnell's Varada Raja's Daya Nirnaya, Preface.

[3] The Collector of Madura *v.* Muttu Ramlinga Satthuputty, 2 Sutherland's Privy Council Appeals, 135.

LECTURE VIII. is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School."[1]

Maharashtra School. "Manu, the Mitakshara, and Mayukha," says Justice Westropp of the Bombay High Court, "are the reigning authorities in this Presidency. In the island of Bombay, a general—I do not, however, by any means, say a universal—predominance has been given by our predecessors in the Recorder's, Supreme, and High Courts, to the Mayukha over the Mitakshara, partly perhaps because they found it more frequently quoted to them than the Mitakshara,—partly perhaps because the Mayukha was very much praised and followed in Guzerat—Bombay having formed a part of the ancient kingdom of Guzerat before the cession of the former to the Portuguese,—and partly because the Mayukha was the more modern treatise, and might be supposed to embody, to a considerable extent, such variations in usage as had occurred during the long period which intervened between its composition and of the Mitakshara."[2]

"It must, however, be recollected," continues Justice Westropp, "that high as undoubtedly is the authority of the Institutes of Manu, the Mitak-

[1] Gridhari Lall Roy v. The Government of Bengal, Sutherland's Privy Council Appeals, Vol. II, p. 163.
[2] Lallubhai Bapu Bhai v. Mankuvarbai, Ind. Law Rep., 2 Bom., 418.

shara, and the Mayukha, in this Presidency at large, it cannot be affirmed that the whole of any one of these works is in full force in any part of this Presidency. They are all subject to the control of usage. In all these are precepts which, if they ever were practical law, have, for a time beyond the memory of living man, been obsolete."[1] LECTURE VIII.

With regard to the "control of usage," the following remarks of the Privy Council are of especial interest to lawyers :—

"It is clear that the sister and her descendants find no place in the tables of succession according to the law of the Mitakshara, which have been framed by several persons of authority, and in particular by that eminent Hindu lawyer, the late Prosonno Coomar Tagore. The learned counsel for the appellant seemed indeed to concede this, and to admit that the exclusion did prevail in fact ; but he contended that it had its origin in error, and pleaded for a return for what he contended was the correct interpretation of the texts, founding himself chiefly on the authority of Balam Bhatta. But it is entirely opposed to the spirit of the Hindu race, to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country, and it seems to their Lordships, that it would be extremely

[1] Lallubhai Bapu Bhai v. Mankuvarbai, Ind. Law Rep., 2 Bom., 418.

LECTURE VIII. mischievous to disturb upon points taken here for the first time any such course of decision"[1]

I will conclude this lecture by the following remarks of the Privy Council, in the oft-quoted case of The Collector of Madura *v.* Muttu Ramlinga Satthuputty:[2]—

"The duty of an European Judge, who is under the obligation to administer Hindu law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

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[1] Koer Gholab Singh *v.* Rao Kurun Singh, Sutherland's Privy Council Appeals, Vol. II, p. 476.

[2] Sutherland's Privy Council Appeals, Vol. II, p. 140.

LECTURE IX.

DEVELOPMENT OF THE PRINCIPLES OF SUCCESSION FROM THE ELEVENTH TO THE FIFTEENTH CENTURY.



Doctrines of Succession in different schools — *Mitakshara* — Right by birth — Concurrent rights of father and son in ancestral property — Son — Wife — Daughters — Daughter's son — Two parents: 1st mother, then father — Brothers — Brothers' sons — Gentiles — Cognates — Preceptor, pupil, fellow-student, a priest, king — Effect of reunion with a parcener — Four canons regarding the rights of parceners — *The Apararka's tabulation of heirs* — Sons — Grandsons — Widow — Brother — Excluded by parents if the property be ancestral — Vedic theory of exclusion of women interpreted — Daughter — Parents: 1st father, then mother; brothers, their sons — Gotrajas — Bandhus — Katyayana's dictum as to father's right in default of male issue — Mother's right according to Vrihaspati — Vrihaspati's numeration of heirs after daughter's son — Duties of the heir as enjoined in Smriti — *Smriti Chandrika on heirs* — Shares of male descendants determined *per stirpes* — Adopted son alone recognized in Kali age, as a substitute for son begotten — Appointment of a daughter prohibited in the Kali age — Share of the adopted son, when a son of the body is afterwards born — Widow — Daughters — Barren daughters excluded — Daughter's son — Parents — Grandmother — Uterine brother — Half-brother — Brothers' sons — *Gotraja* — *Gotraja* excludes father, brother, and his son, also the daughter of the grandfather and the like females — Females excluded from inheritance according to Sruti — Their enumeration and order of succession — Bandhus — Succession in default of them — *Parijata's enumeration of heirs, when a person separated from his co-heirs dies, leaving no male issue* — Wife — Daughters — Daughter's son — Parents: 1st mother, then father — Brethren — Brother's son — Gentiles — Cognates — Preceptor or pupil — Fellow-student — Venerable priests — A Brahmin of the neighbourhood — The property of a Bramhin does not escheat to the king — Estate of a Kshetriya or of one belonging to an inferior tribe passes to the king to the exclusion of Brahmin — *Vivada Ratnakara: principles of succession founded on spiritual benefit* — The rule of inheritance when the deceased leaves no male issue — Claims of the widow considered — Daughter — Mother — Relative claims of the father, mother, and brother discussed — Sakulya, or distant kinsman — Preference given to mother — Brothers — Nearest kinsmen, or sapindas — Escheat — *Madhabacharya's catalogue of heirs* — Different classes of sons — Rule when no son exists — Daughters; daughter's son — Parents: 1st mother, then father; brothers; brother's son — Paternal grandmother — Paternal grandfather, paternal uncles and their sons — Great grandfather, his sons and grandsons — Gotrajas to the seventh degree —

LECTURE IX.

Samanodakas — Bhandavas — Teacher, pupil, and Brahmins — Rights of women to inheritance considered — The claim of different kinds of brothers discussed — *Virada Chintamani on succession, when the deceased leaves no male descendant* — Chaste wife — Daughters: 1st maiden, then married; mother, father, daughter's son, brother, brother's son, sapindas, sagotra, bandus, king — Succession in case of reunion — The daughters and the father entitled to maintenance — Relative claims of brothers of various kinds — *Dayabhaga on Inheritance* — Rules based on spiritual benefit — Equality of son's, grandson's, and great grandson's right — When the two latter are not excluded by their father — Distribution between a son and grandson by another son who is dead — Right of the son born after partition — Widow; her right not affected by her husband's reunion with his co-heirs — Her right not absolute, but limited to simple enjoyment — Her right of mortgage or alienation, when she cannot maintain herself otherwise — Daughter: 1st maiden daughter, then one who has, or is likely to have, male issue — Barren and widowed sonless daughter excluded — Daughter's son — Father — Mother — Stepmother excluded — Brothers — First brother of the whole blood, then half-brother — Equal right of associated half-brother and unassociated uterine brother — Nephews — The nephew excludes the paternal uncle — The nearer line excludes the more remote — Paternal uncle excludes brother's grandson — Sister's son — Grandfather's and great grandfather's lineal descendants — Maternal kindred — *Sakulya*, or distant kinsman: allied by divided oblation — Samanodakas — Strangers.

Doctrines of Succession in different schools.

I will place before you in this and the succeeding Lecture the leading doctrines of Succession approved in the different schools of Hindu law. I will begin with the Mitakshara of Vijnanesvara, and end with the Digest of Jagannatha, the latest original writer on the Law of Inheritance. You will thus have a complete view of the different stages of development of the principles of inheritance from the end of the eleventh to the end of the eighteenth century. In the two previous Lectures I attempted to discover the causes which led to the *growth* of the Law of Succession. "The conflicting doctrines" of the Hindu legislators are often stigmatized as misleading and barren of practical results. By marking the growth of

these doctrines in different ages, you will perceive that the 'conflicting' maxims are only the inevitable outcome of the law of progress. When you read, side by side, the dicta of the different legislators, you will find that each succeeding age altered, added to, and improved upon, the rules which were laid down in former ages. Traces of advancement are distinctly visible. The rules suited to one set of circumstances are totally inapplicable in a different condition of society. The different legislators merely reflected the spirit of their time, and their 'conflicting' doctrines are but the backward and forward oscillations of an ever-advancing tide of progress.

Let us hear now what Vijnanesvara says :

MITAKSHARA.

By Vijnanesvara.

[1076.]

Mitakshara.

The term 'heritage' signifies that wealth which becomes the property of another *solely* by *relation* to the owner. The wealth of the father or of the paternal grandfather becomes the property of his sons or grandsons, in right of their being his sons or grandsons. The property devolves on parents (or uncles), brothers, and the rest, upon the demise of the owner, if there be no male issue, *in right* of their being his uncles or brothers. The same holds good in respect of their sons or other (descendants).[1]

Right by birth.

Therefore, it is a settled point that property in the paternal or ancestral estate is by birth,[2] and not by demise of the last owner.[3]

[1] I, 1. 2, 3. [2] I, 1, 27. [3] I, 1, 22, 23.

LECTURE IX.

Concurrent rights of father and son in ancestral property.

The father and the son have equal rights in ancestral[1] property. Although grandsons (also) have by birth a right in the grandfather's estate equally with sons, still the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves. The meaning here expressed is this. If unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So, if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text—"Among grandsons by different fathers, the allotment of shares is according to the fathers."[2]

Son.

Of the twelve classes of sons mentioned by *Yajnavalkya*, the next in order, as enumerated, must be considered to be the giver of the funeral oblation or performer of obsequies, and taker of a share or successor to the effects.[3]

Manu, having premised two sets of six sons, declares the first six to be heirs and kinsmen; and the last to be not heirs, but kinsmen. That must be expounded as signifying that the first six may take the heritage of their father's collateral kinsmen (*sapindas* and *samanodakas*); but not so the last six.[4] All, without exception (however), have a right of inheriting their father's estate for want of a preferable son.[5]

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[1] I. 5, 3. [2] Yajnavalkya. II. 121.
[3] I. 11, 22. [4] I, 11, 31. [5] I, 11, 33.

LECTURE IX.

That sons, principal and secondary, take the heritage has been shown. The order of succession among all (tribes and classes) is next declared:

"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student: on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all persons and classes."[1]

Wife.

In the first place, the *wife* shares the estate. 'Wife' signifies a woman espoused in lawful wedlock. The singular number denotes a class; so that, if there be more than one, they divide the estate amongst themselves, and take their respective shares.[2] It is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue.[3]

Daughters.

On failure of her, the daughters inherit. They are named in the plural number, to suggest the equal or unequal participation of daughters alike or dissimilar by class. If there be competition between the married and unmarried daughter, the *unmarried* one takes the succession. If the competition be between an unprovided and enriched daughter, the unprovided one inherits; but, on failure of such, the enriched one succeeds.[4]

Daughter's son.

By the import of the particle 'also' the daughter's son succeeds to the estate on failure of daughters.[5]

Two parents: 1st mother, then father.

On failure of those heirs, the two parents, meaning the mother and the father, are successors to the property. As the word 'mother' stands first in the phrase into which

[1] Yajnavalkya, II, 136, 137. [2] II, 1, 5.
[3] II, 1, 39. [4] II, 2. 1—4. [5] II, 2, 6.

LECTURE IX.

the compound 'parents' is resolvable, the mother takes the estate in the first instance; and, on failure of her, the father. Besides, the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance, conformably with the text—"To the nearest *sapinda* the inheritance next belongs."[1] Therefore, since the mother is the nearest of two parents, it is most fit that she should take the estate. But, on failure of her, the father is successor to the property.[2]

The claim in virtue of propinquity is not restricted to *sapindas*, or blood relations, alone; but, on the contrary, it appears from the very text of Manu quoted above—"To the nearest sapinda the inheritance next belongs"—that the rule of propinquity is effectual, without any exception, in the case of samanodakas, as well as other relatives, when they appear to have a claim to the succession.[3]

Brothers.

On failure of the father, brethren share the estate. Among brothers, such as are of the whole blood, take the inheritance in the first instance, under the text before cited, "To the nearest sapinda the inheritance next belongs;" since those of the half-blood are remote through the difference of the mothers. If there be no uterine brothers, those by different mothers inherit the estate.[4]

Brothers' sons.

On failure of brothers also, their sons share the heritage in the order of their respective fathers. In case of competition between brothers and nephews, the nephews have no title to the succession; for their right of inheritance is declared to be on failure of brothers.[5]

However, when a brother has died leaving no male issue,

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[1] Manu, IX, 187; Mitakshara, II, 3. 1—3. [2] II, 3. 5.
[3] II, 3, 4. [4] II, 4. 1, 5, 6. [5] II, 4, 7, 8.

and the estate has consequently devolved on his brothers indifferently, if any of them die before a partition of their brother's estate takes place, his sons do, in that case, acquire a title through their father; and it is fit, therefore, that a share should be allotted to them in their father's right, at a subsequent distribution of the property between them and the surviving brothers.[1]

LECTURE IX.

Gentiles.

If there be not even brother's sons, gentiles share the estate. Gentiles are the paternal grandmother and sapindas and samanodakas. In the first place, the paternal grandmother takes the inheritance. On failure of the paternal grandmother, the sagotra sapindas or blood-relations sprung from the same family with the deceased,—namely, the paternal grandfather and the rest—inherit the estate. For *bhinna gotra sapindas,* or sapindas sprung from a different family, but connected by consanguinity with the deceased, are indicated by the term *bandhu,* or cognate.

Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue, inherit. In like manner, up to the seventh degree, must be understood the succession of kindred, known as *sagotra sapindas.*

If there be none such, the succession devolves on *samanodakas;* and they must be understood to reach to seven degrees beyond the kindred known as *sapindas;* or else, as far as the limits of knowledge as to birth and name extend. Accordingly *Vrihat Manu* says: " The

[1] II, 4, 9.

LECTURE IX. relation of the *sapindas* ceases with the seventh person; and that of *samanodakas* extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra*, or the relation of family name."[1]

Cognates. On failure of gentiles, the cognates (bandhus) are heirs. Cognates are of three kinds—related to the person himself, to his father, or to his mother, as is declared by the following text: "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as *his own cognate kindred.* The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his *father's cognate kindred.* The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his *mother's cognate kindred.*"

Bandhus.

I.	His own father's sister's son	(1)		His own *bandhus.*
	„ „ mother's „ „	(2)		
	„ „ maternal uncle's „	(3)		
II.	Father's father's sister's son	(4)		Father's *bandhus.*
	„ mother's „ „	(5)		
	„ maternal uncle's „	(6)		
III.	Mother's father's sister's son	(7)		Mother's *bandhus.*
	„ mother's „ „	(8)		
	„ maternal uncle's „	(9)		

Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance;

[1] II, 5.

on failure of them, his father's cognate kindred; or if there be none, his mother's cognate kindred.[1]

Preceptor, pupil, fellow-student,

If there be no relations of the deceased, the preceptor, or, on failure of him, the pupil, inherits. If there be no pupil, the fellow-student is the successor. If there be no fellow-students, a learned and venerable priest should take the property of a *Brahmana*. Never shall a king take the wealth of a priest. But the king, and not a priest, may take the estate of a *Kshatriya* or other person of an inferior tribe, on failure of heirs down to the fellow-student.

a priest, the king.

Effect of reunion with a parcener.

The author (Yajnavalkya) next propounds an exception to the maxim, that the wife and certain other heirs succeed to the estate of one who dies leaving no male issue. "A reunited (parcener) shall keep the share of his reunited (co-heir) who is deceased, or shall deliver it to (a son subsequently born).[2] On failure of male issue, the reunited parcener, and *not the widow, nor any other (female) heirs*, shall take the inheritance."

If there be brothers of the whole blood and halfblood, an uterine brother, being a reunited parcener, not a half-brother who is so, takes the estate of the reunited uterine brother. This is an exception to the rule, that "A reunited parcener shall keep the share of his reunited co-heir who is deceased."[3]

Next, in answer to the inquiry, who shall take the succession when a reunited parcener dies leaving no male issue, and there exists a whole brother not reunited, as well as a halfbrother who was associated with the deceased, it is shown that a whole brother not reunited, and a halfbrother being reunited, shall take and

[1] II, 6. [2] Yajnavalkya, II, 139. [3] II. 9. 1—6.

LECTURE IX.

share the estate.[1] The relationship by the whole blood is a reason for the succession of the brother, though not reunited in coparcency; and reunion is a reason for a halfbrother's succession.[2]

In case of reunion, brothers of the halfblood, who were reunited after separation, and *sisters* by the same mother, likewise participate. They inherit the estate and divide it in *equal* shares.[3]

Reunion.

Four canons regarding the rights of parceners.

1. In an undivided family, the widow and the other female heirs are excluded by the associated parceners of the deceased.

2. The associated brethren of the whole blood exclude halfbrothers.

3. The unassociated uterine brothers and the associated halfbrothers inherit together.

4. The associated halfbrothers, and sisters by the same mother divide the estate in equal shares.

Apararka's tabulation of heirs.

APARARKA.

[1125.]

Sons.

The paternal estate is divided equally among sons.

Twelve classes of sons were recognized in former ages. Of all the secondary sons, the *dattaka*, or the adopted son, alone is legally acknowledged in the present age.

Grandsons.

"Among grandsons by different fathers, the allotment of shares is according to the fathers."[4] The meaning is, that the grandsons do not share *equally* with their uncles. If an unseparated brother dies leaving male issue, the nephew gets his father's share from his uncle.

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[1] II, 9. 7, 11. [2] II, 9. 8—9. [3] II, 9, 13.
[4] Yajnavalkya, II, 121.

The son of the nephew also is entitled, on failure of the nephew, to his grandfather's share. But the grandson of the nephew has no claim to the paternal property.

LECTURE IX.

On failure of male issue, a faithful widow is entitled to the whole of her husband's property which was acquired by him without any detriment to his paternal estate. If the widow be young and suspected of unchastity, her claim should be overlooked, and the inheritance should devolve upon the brothers. In dividing the property among brothers, the following rule should be observed. If the property was jointly acquired by the brothers without any detriment to the paternal property, then the surviving brothers should equally share it amongst themselves, in preference to their parents. But if the estate claimed was *ancestral* property, then the parents shall exclude the brothers.

Widow.

Brother.

Excluded by parents if the property be ancestral.

The Vedic text that "Women are devoid of sense, and are, therefore, not entitled to inheritance," should be explained in the following manner. They are not entitled to inherit, *if there be male issue.*

Vedic theory of exclusion of women interpreted.

Daughters succeed on failure of the widow; and the parents come after them. Of the parents the father succeeds first, and then the mother.

Daughter.

Parents: 1st father, then mother,

In default of the parents, the brothers are heirs. Of these, the uterine brothers are preferred to the *half-brothers*, for the former are nearer than the latter. The uterine brothers are entitled to perform the *sraddha* of maternal kinsmen, and the half brothers have no right to do so.

brothers;

The sons of brothers come after the brothers.

their sons.

On failure of nephews, the *gotrajas* are heirs. Of these, the *nearer* is first entitled to the property.

Gotrajas.

LECTURE IX.

Manu ordains :—" The propinquous kinsman of the (deceased) sapinda inherits his property."[1] The heritable propinquity also has thus been explained by him : " To three ancestors must water be given, &c."[2] That person who gives the water and the cake to any of the three paternal ancestors to whom the deceased was bound to present them, is a propinquous sapinda of the deceased; and the descendants of the same person, who give the water and the cake to any of the ancestors to whom the deceased was bound to give them, are also propinquous sapindas of the deceased. Among these the uterine brother is a nearer sapinda to the deceased than any other kinsman, because he presents the water and the cake to the same ancestors on whom the deceased was bound to confer them. The nephew is a little more remote than the uterine brother, because the former gives a cake (to his father) which has no connection whatever with the deceased. The son of the nephew is more remote than the nephew himself, because that son presents two pindas (to his father and grandfather) which have no connection whatever with the deceased. Similarly, any other description of brother, his son, and grandson (are related in different heritable degrees to the deceased).

Bandhus.

In default of gotrajas, the *bandhus* take the heritage. These are the sons of the father's sister, mother's sister, and maternal uncle's son, *and similar kinsmen.*

On failure of *bandhus*, first the pupil and then the fellow-student are successors.

Katyayana's dictum as to father's right in default of male issue.

As to what Katyayana says :—" On failure of male issue, the father shall take the estate acquired by his son after partition, or the brother, or the natural mother,

[1] Manu, IX, 187. [2] IX, 186.

or the paternal grandmother in natural order;" this was merely to show that the heritable right accrues to them in default of male issue. The omission here of widow and daughters should, therefore, be supplied. The text then would read thus: the brother shall inherit in default of the father with the mother's consent. If the consent be withheld, then the mother shall take the estate according to the following text of Vrihaspati: "The mother must be considered as heiress of her son, who dies leaving neither wife nor male issue; or with her consent, the brother may be heir." In default of these the grandmother (father's mother) of the deceased inherits.

LECTURE IX.

Mother's right according to Vrihaspati.

After naming the daughter and daughter's son (as heirs), Vrihaspati proceeds: "On failure of them, uterine brothers, and sons of brothers, kinsmen bearing the same family name, pupils, and learned priests, are entitled to possess the estate."

Vrihaspati's enumeration of heirs after daughter's son.

Lastly, the KING shall take the estate of a subject dying without an heir; for, says Vrihaspati, he is lord of all. The property of a priest can never escheat to the KING.

Smriti:—He who takes the property of another shall perform his *sraddha*, and shall present the funeral oblation to three ancestors. By saying "oblation to three ancestors," the *sraddha* performed on the day of the new moon must have been here intended.

Duties of the heir as enjoined in Smriti.

Vishnu says:—"The son shall offer the funeral oblations even if he does not get any property of his father."



Lecture IX.

Smriti Chandrika on heirs.

SMRITI CHANDRIKA.[1]

By Devananda Bhatta.

[1150.]

Shares of male descendants determined *per stirpes.*

The shares of property left by the father, grandfather, and great grandfather are to be adjusted through their respective fathers, and not with reference to themselves.

The son of the grandson of the deceased proprietor takes, in default of his father, the share of his father. Where there is no such son too (*i.e.*, son of the grandson), but his sons are in existence, they, as the descendants of the deceased proprietor, do not take a share in the property of their great great grandfather. *The right of inheritance here ceases.*

A great grandson has been declared entitled to his great grandfather's property, just on the same principle on which a son and the like have been declared entitled to their mother's property. This is simply because they survive the deceased, and offer funeral oblations to her. It has hence been properly declared, "Let his (grandson's) son take the share."

It must hence be understood that, whoever, by reason of the deceased proprietor being related to him as father, grandfather, or great grandfather, offers funeral oblations to him, becomes entitled to participate in his (deceased's) property, notwithstanding that the deceased had got other sons, grandsons, and the like.

Hence, Devala:—"Sages declare partition of inheritable property to be co-ordinate with the gift of funeral cakes."

The meaning is, that Manu and other sages contem-

[1] The following copious extracts are taken from the excellent translation of Smriti Chandrika, by T. Kristna Sawmy Iyer.

plate the partition of inheritance as well as the presentation of funeral oblations to extend to the fourth in descent.[1]

LECTURE IX.

Adopted son alone recognized in Kali age, as a substitute for son begotten.

The secondary sons enumerated (by Manu and other sages) had all been recognized as sons in former ages; but in the Kali age the *adopted* son alone is acknowledged. By the text,—"None is to be recognized as a son except a son of the body, or one who is adopted," the learned have, in the early period of the Kali age, prohibited the recognition of any other son than the legitimate and the adopted, with the view of maintaining virtue in the world.

Appointment of a daughter prohibited in the Kali age.

The appointment of a daughter to raise up a son to her father must also be considered by the same text to be prohibited in the Kali age, such a son not being either one of the body or adopted. The conclusion hence is, that, in the Kali age, in default of a legitimate son or grandson, the adopted son alone and none else is recognized as a subsidiary son.

Share of the adopted son when a son of the body is afterwards born.

In taking the assets of the adoptive father too, there are certain instances in which the boy adopted does not inherit the *whole* estate. Accordingly Vas'ishtha:—"When a son has been adopted, if a legitimate son be afterwards born, the *given* son shares a fourth part."

If, where, among several brothers, one has a true legitimate son, and the others have sons of the description of *kshetraja* and the like, and the brothers die in an undivided state, the partition of the grandfather's property then takes place among the principal and secondary sons according to their respective fathers.

There too, where the secondary son of a brother has

[1] Chap. VIII.

LECTURE IX.

been superseded by a legitimate son subsequently born to the same brother, the former, that is the secondary son, gets only a fourth part according to the law as already set forth.

A similar rule is to be observed (*mutatis mutandis*) where some of the brothers only are dead and the others are living.[1]

Widow.

Vrihaspati, observing that wives are more closely allied to the deceased than any one else by reason of their conferring benefits temporal and spiritual on him, holds, that the widows alone are entitled to inheritance in default of secondary sons, notwithstanding the existence of the father and other relations as far as *sakulyas.*

The law, allowing a lawfully-wedded wife *(patni)* to take the entire share of her husband, is applicable to the case of a parcener dying divided and without renuion.

Vrihaspati says:—"Whatever property a man possessed of every kind after division, whether mortgaged or other, the lawfully-wedded wife shall take after the death of her husband, *with the exception of immovable property.*"

The last exception is applicable to a lawfully-wedded wife who has not even a daughter.

Vrihaspati further says:—"After the death of the husband, the widow preserving (the honor of) the family, shall obtain the share of her husband so long as she lives; but she has not property (therein to the extent of) gift, mortgage, or sale."

The competency of a widow to make gifts for religious or charitable purposes, such as the maintenance of old and helpless persons, being sanctioned by law, the above pas-

[1] Chap. X.

Lecture IX.

sage must be held as contemplating the want of independence of a widow in making gifts, &c., for purposes not being religious or charitable, but purely temporal, such as gifts to dancers, and the like.

It must be understood, however, that the law does not deny the independent power of a widow even to make a mortgage or sale for the purpose of providing herself with funds necessary for the discharge of religious duties.

Where there are several widows, it is proper that they should all take the inheritance of their sonless husband by dividing the same in equal shares among them.[1]

Daughters.

Daughters inherit in default of the widow.

Where there is a competition between a daughter unprovided and one unmarried, the unmarried alone first takes; the maintenance of such daughters out of the wealth of the father being indispensable. On failure of such a daughter, the unprovided takes, such a daughter being destitute of the means of subsistence, owing to the inability on the part of her husband to maintain her, although he is bound to do so. In default of unprovided daughters, the daughter provided or enriched and possessing the necessary qualifications, is entitled to the inheritance.

Barren daughters excluded.

The word 'unprovided' in the passage above, means unprovided with wealth, and not unprovided with offspring, such as barren daughters and the like; for daughters of the latter description are not at all entitled to inherit their deceased father's estate, they being incapable to confer on him benefits spiritual through the medium of their offspring. The daughters stand conspicuous in the line of succession by reason of their conferring benefits by means of their descendants.

[1] Chap. XI, 1.

LECTURE IX.

Daughter's son.

On failure of daughters, the daughter's son inherits, he being the offspring of the daughter.

The equality contemplated by Narada between a son's son and a daughter's son must be understood to consist in conferring benefits not temporal, that is, in the performance of sraddhas; it being declared by Vishnu: "In offering oblations to the manes, the daughter's sons are considered as son's son."[1]

Parents.

On failure of the daughter's son, none being more nearly related to the deceased than the father, the text, "The estate of one who leaves no male issue is inherited by the father" here applies, and the wealth, accordingly, becomes inheritable by the father. Likewise, on this very occasion, none being more nearly related to the deceased than the mother, the text "Of a son dying childless (and leaving no widow) the mother shall take the estate" also applies, and the wealth becomes inheritable by the mother.

There being no reason for giving preference to one over the other, the precept alone must be relied upon in the matter. The law gives priority of succession to the father.[2]

Grandmother.

The place which a grandmother ought to take in the order of succession, has been expressly declared to be *after* the mother, and *before* the brother.[3]

Uterine brother.

On failure of the mother, the property devolves on the uterine brother, his propinquity to the deceased being greater by reason of both of them having been born of the same mother.

Half-brother.

On failure of the uterine brother, the wealth goes to the halfbrother, or brother by a different mother.

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[1] Chap. XI, 2. [2] XI, 3. [3] XI, 4.

LECTURE IX.

Brothers' sons.

The sons of brothers are entitled to the succession immediately after them. The sons of the brothers of the whole blood are preferred to those of the halfblood.

Gotrajas.

If it be asked who succeeds if there be not even brothers' sons, Yajnavalkya says: '*Gotrajas*' (or kinsmen sprung from the same general family with the deceased), [add here,] take the inheritance.

Gotraja excludes father, brother, and his son;

The term *gotraja* (though general in its signification) excludes here the father, brother, and his son, who have already been separately noticed; and comprehends the son of the grandfather and such other persons as are sprung from the same family.

also the daughter of the grandfather and the like females.

The term *gotraja* further excludes the daughter of the grandfather and the like females, it being *primâ facie* a compound of two plural terms of the masculine gender formed by omitting one and retaining the other. The term *gotraja* being used in the text of *Yajnavalkya* after the words "brothers likewise and their sons," both of which denote males, must be concluded to mean male *gotrajas* only, and not females.

Gotraja (in Sanskrit) means persons sprung from the same family. But a grandmother is not one sprung from the same family with the deceased. She was born in a different family, and had connection with the family of the deceased only by marriage. She cannot hence be called a *gotraja*. (It is true that the grandmother inherits, but she does so by a special text.)

Females excluded from inheritance according to Sruti.

The following text of the *Sruti* also favors the view that females are as a rule excluded from inheritance: "Females and persons deficient in an organ of sense are deemed incompetent to inherit." This text applies only to females other than the widow, daughter, and the like.

LECTURE IX.

The separate mention of "brothers and their sons," while they are comprehended in the term *gotraja*, is indicative of the rule that, of the descendants severally belonging to the grandfather and others, (only two, namely) the son and the grandson are entitled to inheritance, as is the case with the descendants of the father.

Manu too propounds the same principle :—"Whoever is the next in the line of kinsmen *(sapinda)*, to him the inheritance belongs."

"It would appear," says Dharesvara, "that although, on the demise of a father, his father and son stand both on an equal footing in point of propinquity, and there would thus be no reason, under the text of Manu cited above,[1] for giving preference to one over the other, yet on the strength of the text of the same author, ending with the phrase 'by the brother alone,' the order of succession, with reference to nearness of kin, must take its course through the *descendants* only. Therefore, by the text 'Whoever is the next in the line of kinsmen, &c.,' it must be understood that in default of the descendants of the father, the descendants of the grandfather succeed, and that in default of them, the descendants of the great grandfather take the inheritance. A similar rule of succession must be observed as far as the highest degree of sapindas."

Their enumeration and order of succession.

The order of succession then stands as follows :—On failure of a brother's son, the son of the grandfather succeeds ; on failure of him his son ; on failure of him, the son of the great grandfather ; on failure of him, his son ; on failure of him, the son of the great great grandfather ; on failure of him, his son ; on failure of him, the son of

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[1] IX, 187.

the father of the great great grandfather; on failure of him, his son; on failure of him, the son of the last sapinda; on failure of him, his son; on failure of him, the son of the first samanodaka; on failure of him, his son. A similar rule is to be observed in regard to the succession of the descendants of each of the *six* samanodakas of the higher grade.

Lecture IX.

On failure of these, the *bandhus* or cognate kindred succeed.

Bandhus.

Of the kinsmen (sapindas), distant kinsmen (samanodakas), and cognate kindred, in default of one that stands nearest in the order *expressly* given, he that may be viewed among them to stand on a par with him may be selected; it being generally declared by Gautama:—" Let those take the inheritance who are allied by the *pinda* or *gotra*, or connected through the same Rishi."[1]

Succession in default of them.

In default of bandhus, the order of succession is as follows:—

1. The preceptor.
2. The pupil.
3. The fellow-student.

MADANA PARIJATA.

By Visvesvara Bhatta.

[1175.]

Parijata's enumeration of heirs when a person separated from his co-heirs dies leaving no male issue.

The following is the order of succession to the estate of a man who, being separated from his co-heirs, departs for heaven without leaving any male issue:—" The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student."[2]

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[1] Smriti Chandrika, X. 5.

[2] Yajnavalkya, II, 136, 137.

LECTURE IX.

"On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue." This rule extends to all (persons and classes).

Wife.

Wife (patni) signifies a woman espoused in lawful wedlock; the term here used in the singular number may be extended to a plurality of wives lawfully wedded, whether they are of a like or dissimilar class. The property is to be divided by them according to their class.

Daughters

On failure of wife, the daughters inherit. Thus Katyayana says: "Let the widow succeed to her husband's wealth, provided she be chaste; and in default of her, let the daughters inherit, if unmarried." Under specific provision of the word unmarried, it is meant that if there be competition between a married and an unmarried daughter, the unmarried one takes the succession; and in default of her, the married. Among the daughters, the unprovided are to inherit first, and then the enriched. The text of Gautama is equally applicable to the paternal as to the maternal estate. A woman's separate property goes to her daughters unmarried or unprovided.

Daughter's son.

On failure of daughters, the daughter's son succeeds to the estate. Thus Vishnu says: "If a man leave neither son nor son's son, nor (wife nor female) issue, the daughter's son shall take his wealth." For in regard to the obsequies of ancestors, daughter's sons are considered as son's sons. Yajnavalkya has likewise declared this by the use of the particle 'also' in the case concerning daughters.

Parents:

In default of daughter's son, the parents are successors to the property. Here the word (*pitarau*) is a conjunctive compound, and though the order of succession is not fully expressed, yet the order of succession is sufficiently

obvious from the phrase itself; therefore the order of succession is to be inferred from the order in which the words stand in the phrase, that is, the mother succeeds first, and then the father. In explaining the text concerning the succession of wife, &c., we have treated fully of the subject in our commentary on Mitakshara, called *Subodhini*, in the chapter on 'Vyavahara'; and we abstain from speaking more about it here, as it will lead to a tedious discussion.

Lecture IX.

1st mother, then father.

On failure of father, the brethren share the estate; the uterine brothers share first, because there is a direct consanguinity between them, as they are born of the same mother. After them, brothers by different mothers inherit the estate. The order of succession is regulated by the degree of propinquity. "To the nearest kinsman the property of the (deceased) sapinda next belongs." That is, among the kinsmen, he whose propinquity is greatest by reason of his near connection of the body with the deceased sapinda is entitled to the succession.

Brethren.

In default of uterine or half brothers, the brother's sons are entitled to inherit. Among them, the uterine brother's sons are first to take the heritage, and in their absence the half brother's sons succeed.

Brother's son.

When a brother has died and the estate has devolved consequently on his brothers indifferently, agreeably to the text concerning 'Wife, daughters, &c.,' if any one of them die before the partition of their brother's estate takes place, his sons do, in that case, acquire a title to a share of the estate, through the right of their father, because their father died after acquiring a right to the estate.

If there be not even brother's sons, gentiles share the estate. Gentiles are the paternal grandmother, paternal grandfather, paternal grandfather's sons, and their sons.

Gentiles.

LECTURE IX.

In default of them, paternal great grandmother, &c., inherit the estate; in the absence of whom, the samanodakas share the heritage.

Here this rule is to be observed. In default of brother's sons, the paternal grandmother succeeds to the estate. In her default, the paternal grandfather. As a father succeeds to the estate in the absence of a mother, so the grandfather is entitled to the estate in the absence of the grandmother. And as brothers succeed in default of father, so the paternal uncles succeed to the estate in the absence of paternal grandfather. Among the paternal uncles, the succession of uterine and halfblood uncles should be regulated in the same manner as in the case of brothers, that is, the paternal grandmother's sons first inherit, and after them the stepgrandmother's sons, and in their default the paternal uncle's sons inherit in the same manner as brother's sons. In default of them, the paternal great grandmother succeeds to the estate, and in her absence, the paternal great grandfather, and in his absence his sons, and in their default, their sons. In this manner must be understood the succession of sapindas to the seventh degree; if there be no such kindred to the seventh degree, the succession devolves on the kindred known as samanodakas. In these cases also, the law of consanguineous propinquity should be observed as directed above.

Cognates.

On failure of gentiles, the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father, or to his mother, as is thus declared by Vriddha Satatapa :—

"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncles, must be considered as his own cognate kindred. The

sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred." Here, by reason of near affinity (greater propinquity), the cognate kindred of the deceased are his successors, in the first instance, agreeably to the order in which they stand in the above text. On failure of them, his father's cognate kindred; or if there be none, his mother's cognate kindred. This is the order of succession here intended.

Preceptor, pupil.

If there be no cognates, the preceptor, or, on default of him, the pupil inherits, so says Apastamba. "If there be no male issue, the nearest sapinda succeeds, or in default of sapindas, the preceptor; or failing him, the disciple."

Fellow-student.

If there be no pupil, the fellow-student is a successor: he who received his investiture or instruction from the same preceptor is a fellow-student.

Venerable priests.

If there be no fellow-students, the srotriya or the venerable priests take the property. Thus says Gautama, "Venerable priests should share the wealth of a Brahmin who leaves no issue." He who has learnt a portion of the Vedas is called a venerable priest.

A Brahmin of the neighbourhood.

If there be no such successors, any Brahmin of the neighbourhood may be the heir. Thus Manu says: "On failure of all those, the lawful heirs of such Brahmins as have read the three Vedas, as are pure in body and mind, and as have subdued their passions. Thus virtue is not lost."

LECTURE IX.

The property of a Bramhin does not escheat to the king.

The wealth of a Brahmin shall never be taken by a king. Thus says Narada: "If a Brahmin dies without leaving any heirs, his estate should be given to the Brahmins; otherwise the king shall be guilty of sin."

Thus also says Manu: "The property of a Brahmin shall never be taken by the king. This is a fixed law."

Estate of a Kshetriya or of one belonging to an inferior tribe passes to the king to the exclusion of a Brahmin.

But the king and not a Brahmin may take the estate of a Kshatriya or other persons of an inferior tribe. So Manu ordains: "But the wealth of the other classes on failure of all (heirs) the king may take."[1]

VIVADA RATNAKARA.

By Chandesvara.

[1314.]

Vivada Ratnakara: principles of succession founded on spiritual benefit.

Chandesvara, we find, bases the rules of succession on the spiritual principle. In the chapter on 'Partible property' he broadly lays it down that the benefit conferred on ancestors by descendants, down to the great grandson, is the sole ground on which they inherit the estate of the deceased proprietor. We will quote his exact words. He says:—

"To three must water be given, for three is the funeral cake ordained." According to this text (of Manu), he who benefits another by offering a funeral cake to him, shall take his property.

This leaves no doubt that the author of the Vivada Ratnakara was firmly of opinion that the spiritual principle was the basis of the law of inheritance. He who

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[1] Translated by P. C. Tagore.

"त्रयाणामुदकं कार्य्यं त्रिषु पिण्डः प्रवर्त्तते" इति वचनात् यो यस्य पिण्डदानेनोपकरोति स तस्य विभज्य धनं गृह्णीयादित्यर्थः ।

was entitled to perform the exequial ceremonies of his deceased kinsman, possessed also the right to inherit his property.

LECTURE IX.

If this fact be borne in mind, the rules of succession framed by Chandesvara become clear and consistent.

We will now give a few extracts from the chapter on Inheritance :—

The rule of inheritance when the deceased leaves no male issue.

Regarding the succession to the property of one leaving no male issue, Manu says :—" If the widow of a man, who died without a son, raise up a son to him by one of his kinsmen (sagotra), let her deliver to that son (at his full age) the collected estate of the deceased, whatever it be."[1]

Claims of the widow considered.

Parijata remarks that the widow of a person dying without issue shall, after raising up a son to him by her husband's brother, or by any other *sagotra sapinda* (kinsman bearing the same family name), deliver to this son the collected wealth to which her husband's right of ownership had accrued. She must (on no account) appropriate it herself.

The author of the *Prakasa* says, however, that the KING shall summon a kinsman born in the same family as the deceased (sagotra), and deliver the property to him. There does not appear to be any difference between the two opinions.

Vriddha Manu :—

" A widow who has no male issue, who keeps the bed of her lord inviolate, and who strictly performs the duties (of widowhood), shall alone offer the cake at his obsequies, and succeed to his whole estate."

This means the *widow* of a person who dies without

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[1] IX., 190.

LECTURE IX.

leaving any of the twelve classes of sons recognised by law. By '*duties*' is implied the duties of widowhood.

Vrihaspati :—

"In scripture, in law, in sacred ordinances, in popular usage, a wife is declared by the wise to be half the body *of her husband,* equally sharing the fruit of pure and impure acts :

"Of him whose wife is not deceased, half the body survives ; how should another take the property while half the body of the owner lives ?

"Although distant kinsmen, although his father and mother, although uterine brothers, be living, the wife of him who dies leaving no male issue shall succeed to his share :

"*Since she was* previously espoused in due form, she must support the consecrated fire ; and after the death of her husband, the widow, faithful to her lord, shall take his wealth : this is a primeval law.

"Taking his effects, moveable and immoveable, the precious and base metals, the grain, liquids, and clothes, let her cause the several *sraddhas* to be offered in each month, in the sixth, and at the close of the year.

"With food consecrated to the gods and the manes, let her honor paternal uncles, spiritual preceptors, daughter's sons, the offspring of her husband's sisters, and his maternal uncles, learned men, unprotected persons, guests, and females of the family."

Some hold, that a woman may offer the double set of oblations (parvana) ; to forbid that, the legislator enumerates the *sraddhas* " in each month, in the sixth, and so forth." By the word ' month ' are suggested the *sraddhas* offered in twelve successive months ; by the term ' sixth ' are suggested two *sraddhas* celebrated in the sixth month, *one* before the expiration of it, *the other performed as*

usual; the term 'and so forth' includes the first annual obsequies and the anniversary *sraddha* performed yearly; hence she must celebrate no other obsequies; else those *other sraddhas* must be authorised by other texts; and this precept would be unmeaning.

LECTURE IX.

"Faithful to her lord" means a chaste wife.

Udayakara, however, in his commentary on Manu, explains "faithful to her lord," firm in the rigid duties of a faithful widow. The widow who is faithful to her lord, follows him in death. Consequently, since she cannot herself offer the monthly *sraddhas* and the rest, if she follow her husband in death, the causal form of expression in the phrase "cause to be offered" is pertinent.

This opinion is not respected by many teachers, for, according to this supposition, (blameless) widows, endowed with every quality, but *this* of the strictest fidelity to their lords (which implies their burning with the corpse), would have no title to succession.

If a *chaste* wife then survives a person dying without male issue, the property of her husband devoles on her.

On failure of her, the estate descends to the surviving daughter.

Daughter.

Narada says :—

"If there be no son, the daughter *is heiress* by parity of reason; for she keeps up the progeny, *since* a son and a daughter both continue the race of their father."

Manu :—

"The son of a man is even as himself, and as the son, such is the daughter: how then, *if he have no son,* can any inherit his property, but a daughter who is closely united with his own soul.[1]"

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[1] IX, 130.

LECTURE IX.

Vrihaspati :—

" As sons, so do the daughters of men spring from (their) successive limbs ; how then should any other human being inherit the property while a daughter exists ?

" Married to a man of equal class, virtuous, delighting in submission, she shall inherit her father's estate, whether she be expressly appointed or not (to raise up male issue to him.) "

Vrihaspati again :—

Mother.

" The mother may be considered as heiress of her son, who dies leaving neither wife nor male issue ; or, with her consent, the brother may be heir."

Manu :—

" Of a son dying childless, the mother shall take the heritage ; and she also being dead, the paternal grandmother shall take the estate."

By the word 'childless' here is intended " destitute of sons, widow, &c." It must be understood also that the right of *the grandmother* accrues (only) on failure of such sapindas, as father and brother ; for the heritable right of father and others is well established in default of the mother.

The word 'heritage' here signifies the property which is inherited by legal heirs.

Relative claims of the father, mother, and brother discussed.

Gautama, speaking of the division of the property among unassociated brothers, says :

" The wealth of deceased (brothers) goes to the eldest."

The meaning is, if any of the younger brothers, who was separated from his co-heirs and not reunited with them, dies childless, his share devolves on the eldest alone.

It should be clearly understood, however, that this rule applies only *on failure* of the widow, the mother, and the father.

LECTURE IX.

Manu :—

"Of him who leaves no son, the father shall take the inheritance, and the brothers.[1]

"To three ancestors must water be given at their obsequies ; for three is the funeral cake ordained : the fourth *in descent* is the giver of oblations to them ; but the fifth has no concern with the gift of the funeral cake.[2]

Sakulya, or distant kinsman.

" He who is *next* to the (deceased) sapinda, the property devolves upon him. On failure of him, the *sakulya* or distant kinsman shall be the heir ; or the spiritual preceptor or the pupil."[3]

"Who leaves no son" means "who leaves neither primary nor secondary sons."

The word 'next' implies the nearest *sapinda*.

The word 'property' refers to that of the deceased proprietor, who leaves no son.

The term 'sakulya,' signifies 'samanodaka' or remote kindred.

Paithinasi :—

"The effects of him who leaves no male issue go to his brother : on failure of brothers his father and mother shall take the heritage, or his wife *not eldest*, his distant kinsman bearing the same family name, his pupil, or a fellow-student."

By the epithet "not eldest" is meant the wife, who performs *some* but not *all* the duties of a faithful widow ; for she who fulfils all the prescribed duties of widowhood claims the succession before (and not after) a brother.

By 'not eldest' must never be understood the unchaste wife ; for (it is admitted by every legislator that) she should be banished.

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[1] IX. 185. [2] IX, 186. [3] IX, 187.

LECTURE IX.

By 'fellow-student' is meant, "the fellow-student in theology."

Sankha says :—

"The heirs shall support the widows (of the deceased proprietor) until they die, provided they preserve unsullied the bed of their husband; but if they do not do so, the heirs may resume the property (set apart for their maintenance.")

This dictum of Sankha that widows should only be *maintained,* applies only to widows who, though chaste, do not perform the other prescribed duties of widowhood.

According to the following text of Yajnavalkya—"The parents and the brothers,"—the right of the parents accrues, even if brothers be alive. The rule (of Yajnavalkya) applies to (ancestral) property, *i. e.*, property acquired by the father, grandfather, and other ancestors. But the property which was acquired by the deceased himself without any detriment to the ancestral property, devolves exclusively, even if the parents be alive, on the brother alone.

Devala :—

"Next, let brothers equal (to him in every respect) divide the heritage of him who leaves no male issue; or the daughters; or the father, if he survive his son; or halfbrothers belonging to the same tribe; or the wife or the mother, inherit in their order. On failure of all these, the kinsmen living with the deceased succeed to his property."

The word 'equal' refers to brothers; and the expression 'if he survive' qualifies father. It must be understood also that that father alone inherits who is not indifferent to wealth, and disinclined to pleasure.

Halayudha, believing that there was inconsistency as

regards the order of succession between the texts of Yajnavalkya and Devala, has tried to remove it by stating that the phrase 'in order' (in the text of Devala) refers to the order of succession mentioned by Yajnavalkya.

LECTURE IX.

The author of Kalpataru appears also of the same opinion; because he cites the texts of Vishnu and Yajnavalkya, *after* he had cited the rule of Devala on this point. The fact of the matter is, the order of succession mentioned by Yajnavalkya and Vishnu obtains in property acquired by forefathers, and in the case of *other* property the order of Paithinasi and others holds.

In the text of Yajnavalkya, " The wife, and daughters also, &c.," the term 'male issue' includes the *son*, the *grandson*, and the *great grandson*.

Preference given to mother.

It would appear at first sight that the parents *jointly* inherit their son's property. But the following text of Vrihaspati—" The mother must be considered as heiress of her son, who dies leaving neither wife, nor male issue, &c."—is our authority for stating that the mother is preferred to the father. The father inherits in default of the mother.

After the daughter and daughter's son Vrihaspati proceeds :—

Brothers.

" On failure of those persons, the brothers and nephews of whole blood are entitled to the estate, or kinsmen, or cognates, or pupils, or venerable priests. If the deceased leave no issue, nor widow, nor brother, nor father, nor mother, then all the sapindas or kinsmen shall divide his property according to their share. Of property which descends by inheritance, half should carefully be set apart for the benefit of the deceased owner to defray the charges of his monthly and annual obsequies. Where there are many relatives (sapindas), or remote kindred (sakulya), or cognate kind-

LECTURE IX.

red (bandhava) whoever is nearest-of-kin shall take the wealth of him who dies without male issue."

Nearest kinsmen or sapindas.

Referring to one who dies without leaving issue, Apastamba says:—"If there be no male issue, the nearest sapinda inherits; or in default of kindred, the preceptor, or failing him, the disciple; but whoever will take the estate shall expend a portion thereof for the benefit of the deceased; or his daughter shall inherit." Baudhayana says:—"The paternal great grandfather and grandfather, the father, the man himself, his brothers of the whole blood, his son by a woman of the same tribe, his son's son, and his great grandson, all these partaking of undivided oblations, are pronounced sapindas. Those who share divided oblations are called sakulyas. Male issue of the body being left, the property must go to them. On failure of sapindas, sakulyas are heirs. If there be none, the preceptor, the pupil, or the priest takes the inheritance. In default of all these the king (has the escheat.)"

The foregoing maxims have reference to inheritance, and not to the cases of mourning, &c. There (in mourning, &c.) sapindas are those that are connected by consanguinity; hence there the kinsmen, who are connected by divided oblations, are also sapindas.

"Male issue of the body being left" means, *if sons of the body, &c., exist.* "The property must go to them" means it must be shared by *the sapindas.*

Escheat.

Narada:—"On failure of daughters, the heirs are, kinsmen allied by family, cognates, and men who claim the same origin with the deceased; on failure of all these, the property escheats to the king,

"Excepting the wealth of a Brahmana; but a king attentive to his duty, shall allot a maintenance to the wives of

the deceased. This is declared to be the rule of inheritance." Lecture IX.

Kinsmen allied by family are sons of paternal uncles and the rest. Men who claim the same origin are persons who belong to the same tribe.

THE MADHAVIYA DAYAVIBHAGA.[1]

By Madhabacharya.

[1361.]

Madhabacharya's catalogue of heirs.

Different classes of sons.

Of the twelve classes of sons mentioned by Yajnavalkya, in default of the first, the next offers the pinda, and 'takes a share.'

Dattaka sons, &c., do not share in the wealth of their natural father; thus Manu says:—

"A datrima son may never share in the family or property of his natural father; the pinda follows the family and estate: the funeral offering departs from the giver (of a son)."

The mention of a datrima son is to include kritrimas, &c.

The texts which go to prove that the other substitute sons besides the *Datta* share in the inheritance, refer to some other age of the world; because it is prohibited in another *Smriti* to receive them as sons in the Kali age:—"The receiving of others than the *datta* and *aurasa* as sons, the begetting of offspring by a brother-in-law, and retiring to the forest, all these practices, the wise have said, should be avoided in the Kali age."

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[1] Translated by A. C. Burnell, Madras Civil Service, M.R.A.S.

LECTURE IX.

Rule when no son exists.

Yajnavalkya has laid down the rule of succession to (the property of) a man who has no son as follows :—

"The wife and daughters, &c. This is the rule for all castes." 'Who has no son,' a man who has not one of the twelve kinds of son, *aurasa*, &c. If (such a father) dies, in default of his wife, &c., the next succeeding takes his property. This rule applies to all (castes). Such is the meaning.

The 'wife' is a woman who has been sanctified by marriage; she takes first the wealth of her husband; as Vrihaspati says :—" The wife of the man who dies leaving no son, takes his wealth though there be kinsmen; though parents and uterine brother be alive."

Vriddha Manu mentions difference regarding this case :— "A wife (*i.e.* widow) who has no son, who preserves inviolate the bed of her husband, and is steadfast in her duty, should offer the pinda for him and take the whole share." "The whole share" consisting of moveable and immoveable property.

The wife takes the property of her deceased husband, who was divided and not reunited.

In her default, let daughters, whether of equal caste or not, take according to their shares.

Daughters;

Katyayana has given the rule for the case when there are both married and unmarried daughters. "The wife, if she go not astray, takes the wealth of her husband; in her default, an unmarried daughter in preference to married daughters; if there be some betrothed and some not, the daughter who is not betrothed takes." So Gautama says :—" Stridhana belongs to daughters not married nor betrothed." It must not be thought that this text applies only to a mother's property, for it applies equally to a father's property.

In default of a daughter, daughter's son succeeds. So Vishnu: "In the case of a man who leaves no son, grandson, or (other) descendant, daughter's sons take his wealth; for in performing the funerals of their ancestors, daughter's sons are said to be equal to son's sons." Manu also says:—"By the male child of equal caste, whom a daughter, whether appointed or not, shall bear, the maternal grandfather possesses a grandson, let him offer the pinda and take the wealth." And we ought not to think that the saying "and daughters, the two parents," is incorrect, on the ground that the daughter's son should be mentioned by reason of his taking the property, for the word 'and' in the words 'and daughters' includes a daughter's son.

LECTURE IX.

daughter's son.

In default of a daughter's son, the two parents share the wealth. Now some persons say, that though no rule exists as to the order in which the two parents take the wealth, yet because the 'mother' comes first in the separated word, and she is nearest, the mother takes the wealth first. Others say, that the wealth first goes to the wife; and then, in her default, to the daughter; and in her default to the father; and in his default, to the mother. *In this case what is proper that should be admitted.*

Parents: first mother, then father;

In default of the parents, brothers share the heritage.

brothers;

But of the brothers, uterine brothers first share the heritage, because they are nearer. For Manu says:—"He who is the sapinda in course of succession, let him have the wealth."

In default of brothers, their sons take the paternal wealth, according to their fathers. But we must conclude that, as in the former case of brothers, the sons of uterine brothers first share the heritage; and in their default, the sons of halfbrothers. But if there are concurrently brothers and brother's sons, brother's sons should not succeed; because it

brother's son.

LECTURE IX.

is laid down, that brother's sons succeed in default of brothers. If, however, a brother dies without male issue, and all his brothers succeed to his property, and if any brother dies before the partition of such issueless brother's property, if he has children, because they derive a right from their father, partition between them and the brothers of the father is proper.

Paternal grand-mother.

In default of brother's children, persons of the same *gotra* take the property. Persons of the same *gotra* are, a paternal grandmother, sapindas, and samonodakas. The paternal grandmother succeeds first to the property.

Paternal grand-father, paternal uncles and their sons.

In default of the paternal grandmother, the paternal grandfather, paternal uncles and their sons succeed in order.

Great grand-father, his sons and grandsons.

In default of issue of the grandfather, the great grand-father, his sons and grandsons succeed.

Grotajas to the seventh degree.

As far as the seventh, gotrajas take the property.

Samanoda-kas.

In default of sapindas, samanodakas take the property; and they are the seven males beyond the sapindas, or as far there is recollection of birth and name.

Bandhavas.

In default of gotrajas, *bandhavas* take the property; and they are of three kinds, as has been shown by Baudhayana, "Sons of one's own father's sister, &c." But he who is nearest amongst the bandhavas takes first. So Vrihaspati says: "Where there are many kinsmen, sakulyas, and bandhavas, he who is nearest of them, should take the property of a man who leaves no issue."

Teacher, pupil, and Bramhins.

In default of bandhus, the teacher (of the deceased) succeeds; and in his default, the pupil. In their default it belongs to Brahmans. A Brahman's wealth never goes to the king.

Rights of women to inheritance considered.

The saying which teaches that women cannot own property, refers to property acquired for the purpose of sacrifices. As for the Vedic text:—" Therefore women are powerless (nirindriya), and do not succeed to the heritage:"[1] this means that the wife does not get a share in the *patnivatagraha*, for we see the word 'power' (indriya) is used in the sense of soma, [*e.g.*, 'indriya' is somapitha (*i.e.*, soma-drink).] The text of Vrihaspati which prohibits a wife from taking immoveable property, "Let the wife whose husband is dead, and who was divided, leave the immoveable property and take some pledge, &c.," is only prohibitory of the widow selling or making away with immoveable property without the consent of the other heirs.

The claim of different kinds of brothers discussed.

Let a reunited uterine brother give the estate of a deceased uterine brother to a son born afterwards; and in default of a son, let him take it himself.

If there be a reunited halfbrother, and a separate uterine brother, both succeed to the partible wealth. A halfbrother who is reunited takes the property of his halfbrother, but not so if he is not reunited. A uterine brother, though not reunited, takes the wealth of a uterine brother; not however a halfbrother, though he be reunited.

Other teachers are of opinion that if there be reunited halfbrothers, and uterine brothers who are not reunited, the uterine brothers, though not reunited, take the property; and not the halfbrothers, though they be reunited.

In this case what is reasonable that must be admitted.

If there be no reunited halfbrothers, then the reunited father or paternal uncle takes. If there be not a reunited

[1] Black Yaju, VI, 3, 8. 2.

Lecture IX.

father or paternal uncle, a halfbrother who is not reunited succeeds to the property. In his default, the father who is not reunited; and in his default, the mother; in her default, the wife.

VIVADA CHINTAMANI.[1]

By Vachaspati Misra.

[*Beginning of the* 15*th century.*]

Vivada Chintamani on succession, when the deceased leaves no male descendant.

Regarding the succession to the estate of one who leaves no son, Vishnu says:—

"The wealth of him who leaves no *issue* goes to his wife; on failure of her, to his daughter; if there be none, to the mother; if she be dead, to the father; on failure of him, to the brothers; after them it descends to the brothers' sons; if none exist, it passes to the kinsmen (bandhu); in their default, to relatives (sakulya); on failure of these, to the fellow-student. For want of these heirs, the property escheats to the king, except the wealth of a Brahmin."

Who leaves no issue, means who has no son, grandson, or great grandson. Bandhu signifies here a sapinda; and sakulya signifies a sagotra.

The right of performing funeral obsequies, which is settled according to the order of enumeration in the text, *viz.,* by "the son, the son of a son, and the son of a grandson," &c., also determines their right of inheritance which is similar to (*co-extensive with*) the right of performing exequial rites.

Chaste wife.

In the absence of a great grandson of her husband, the *chaste* wife is entitled to receive his estate. What has been said above applies to the case of the widow of a person who lived *separate* from his co-heirs.

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[1] Translated by P. C. Tagore.

LECTURE IX.

The widow is not competent to make sale and gift of the inherited property at her own choice.[1]

Daughters: 1st maiden, then married,

On failure of widows, the heritage devolves on the daughters.

Parasara says :—" Let the maiden daughter take the heritage of one who dies leaving no male issue ; if there be no such daughter, a married one shall inherit."

mother,

In default of the daughter, the mother succeeds to the estate.

father,

In her default, the father.

daughter's son,

In his default, the daughter's son.

brother,

In default of him, the brother.

brother's son,

In his default, the brother's son.

sapindas,

In his default, the nearest *sapinda ;* in his absence, the remote sapinda in order.

sagotra,

In his default, the nearest *sagotra ;* and in his absence, the remote sagotra in order.

bandhus,

In default of kinsmen allied by gotra, cognate kindred (bandhus) shall succeed, *viz.*, the maternal uncles and others.

King,

But on failure of all these heirs, the KING inherits, except the property of a Brahmana.

Succession in case of reunion.

If any one die after reunion, his property devolves on his living sons, grandsons, or great grandsons, born after partition. In their default, the widow who observes all the rules of widowhood shall get it ; and the other widows

[1] The authors of the Ratnakara and Vivada Chintamani contend, that a wife cannot give away the immovable property of her husband, which has devolved on her by the failure of male issue ; but she may give away movable effects. They expound the text of Katyayana as relating to the personal estate of her husband, which has devolved on her. (2 Cole. Digest, 529).

LECTURE IX.

who are chaste shall be supported, but shall not get any share.

The daughters and the father entitled to maintenance.

The unmarried daughter of such proprietor shall be maintained out of his property till her marriage, the expenses of which shall also be defrayed out of it. If the proprietor leave a father, the latter shall be maintained out of his property like his chaste wives.

In default of the aforesaid heirs, the entire property of the said proprietor shall devolve on those with whom he was reunited.

Relative claims of brothers of various kinds.

If there be reunion between step-brothers and uterine brothers, the reunited uterine brother alone shall get the property.

If there be reunion among step-brothers only, and the uterine brothers remain separated, the step-brothers and the uterine brothers shall equally share the property of the deceased brothers.

If only one survive, he shall get the whole.

If any one acquire property after reunion, by learning and so forth, and add it to the common stock, he will get two parts of it, and the others shall get only one part each.

DAYABHAGA.[1]

By Jimutavahana.

[15*th century.*]

Dayabhaga on Inheritance.

The word 'heritage' is used to signify wealth, in which property, dependent on relation to the former owner, *arises on the demise* of that owner.[2] Partition does not create right, but the demise of a relation is its cause.[3] There is

[1] Translated by P. C. Tagore. [2] I, 5. [3] I, 11-12.

no proof that property is vested by birth alone ; nor is birth stated in the law as means of acquisition.[1]

LECTURE IX.

Manu denies the son's right in the paternal property in his father's lifetime: "They have no power over it while their parents live."[2]

Rules based on spiritual benefit.

The proprietary right of sons and the rest is expressly ordained as inferrible from reasoning, because the wealth devolving upon the sons and the rest, benefits the deceased; since the sons and other male descendants produce great spiritual benefit to their father or other ancestors from the moment of their birth; and they present *parvana* oblations, in due form, after his decease. So Manu declares the right of inheritance to be founded on benefits conferred. "By the eldest son as soon as born, a man becomes the father of male issue, and is exonerated from debt to his ancestors; such a son, therefore, is entitled to take the heritage."[3] From the mention of it as a reason ("therefore," &c.), and since there can be no other purpose in speaking of various benefits derived from sons and the rest, while treating of inheritance, it appears to be a *doctrine*, to which Manu assents, that the right of succession is grounded solely on the benefits conferred. Accordingly the term 'son' extends to the great grandson, for, as far as that degree, descendants equally confer benefits by presenting oblations of food in the prescribed form at the parvana obsequies.[4]

Equality of son's, grandson's, and great grandson's right.

The rule of distribution (after the demise of the father) among sons, extends equally to them and to grandsons and great grandsons in the male line. There is not here an order of succession following the order of proximity accord-

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[1] I. 19.
[2] Manu IX. 104; Dayabhaga. I. 15.
[3] IX. 106.
[4] XI, 1. 32—34.

LECTURE IX.

ing to birth. For those three persons, the son, grandson, and great grandson, do not differ, in regard to the presenting of two oblations at the parvana obsequies, one which it was incumbent on the ancestor to present, and the other which is to be tasted by his manes. Since then such a descendant confers benefits on his ancestors up to the great grandfather, by presenting oblations to the manes, the descendant within the degree of great grandson has an equal right of inheritance.[1]

When the two latter are not excluded by their father.

Hence it is that the son and grandson, whose own fathers are living, have no right of succession; for they do not present oblations to the manes, since they are incompetent to the celebration of parvana obsequies.[2]

Distribution between a son and grandson by another son who is dead.

If there be one son living, and sons of another son (who is deceased), then one share appertains to the surviving son, and the other share goes to the grandsons, however numerous. For their interest in the wealth is founded on their relation by birth to their own father; and they have a right to just so much as he would have been entitled to. If there be numerous issue of one brother and few sons of another, then the allotment of shares is according to the fathers.[3]

Right of the son born after partition.

If the father, having separated his sons, and having reserved for himself a share according to law, die without being reunited with his sons, then a son, who is born after the partition, shall alone take the father's wealth; and that only shall be his allotment. But if the father die after reuniting himself with some of his sons, that son shall receive his share from the reunited co-heirs. Not only one, but even many sons begotten after partition

[1] III, 1, 18. [2] III, 1, 19. [3] III, 1, 21—23.

shall take exclusively the paternal wealth.[1] One born previously to the partition is not entitled to the paternal estate; nor one begotten by the separated father, to the estate of his brother.[2] LECTURE IX.

This rule of distribution is applicable, however, only to the case of wealth acquired by the father. But if property inherited from the grandfather, as land or the like, had been divided, he may take a share of such property from his brothers.[3]

Devala, after having described the twelve sons, and classified them as sons begotten by a man himself, or procreated by another man, or received for adoption, or voluntarily given, is of opinion that the true legitimate son and the rest, to the number of six, are not only heirs of their father, but also heirs of kinsmen,—that is, of sapindas and other relations. The others are successors of their adoptive father, but not heirs of collateral relations (sapindas, &c.) They take the whole estate of a father who has no legitimate issue by himself begotten; but if there be a true son, such of them as are of the same tribe with the father take a third part.[4]

Widow; On failure of heirs down to the son's grandson, the wife, being inferior in pretensions to sons and the rest, because she performs acts spiritually beneficial to her husband from the date of her widowhood (and not like them from the moment of their birth), succeeds to the estate in their default. Since the wife rescues her husband from hell; and since a woman, doing improper acts through indigence, causes her husband to fall (to a region of horror), for they share the fruits of virtue and of vice; therefore, the wealth

[1] VII, 2, 5. [2] VII. 6. [3] VII. 10. [4] X. 7—9.

Lecture IX.

her right not affected by her husband's reunion with his co-heirs.

devolving on her is for the benefit of the former owner, and the wife's succession is consequently proper.[1] The preferable right of the widow is *not* affected by the reunion of her husband with his co-heirs before his death. She is preferred as an heir, whether her deceased husband was associated with or separated from his co-heirs.[2]

Her right not absolute, but limited to simple enjoyment.

But the wife must only *enjoy* her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it. Thus Katyayna says :—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." She shall enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage or sale of it at her pleasure. When she dies, it goes to her husband's heirs, and not to her own heirs. The heirs of the woman's separate property shall *not* take the succession to the exclusion of her husband's heirs. The heirs of her husband, who would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested.[3]

Her right of mortgage or alienation, when she cannot maintain herself otherwise.

Even use should not be by wearing delicate apparel and enjoying similar luxuries; but, since a widow benefits her husband by the preservation of her person, the use of property sufficient for that purpose is authorised. In like manner, even a gift or other alienation is permitted for the completion of her husband's funeral rites. If she is unable to subsist otherwise, she is authorized to mortgage the pro-

[1] XI, 1. 13, 14. [2] XI, 1. 15—30. [3] XI. 1, 56—59.

perty; or, if still unable, she may sell or otherwise alienate it. In the disposal of property by gift or otherwise, she is subject to the control of her husband's family after his decease, and in default of sons.[1]

Lecture IX.

In like manner, if the succession have devolved on a daughter, those persons who would have been heirs of her father's property in her default, take the succession on her death, not the heirs of the daughter's property.[2]

Daughter.

On failure of the widow, the daughter inherits. The circumstance of her continuing the line is a reason for the daughter's succession. The line of descendants here intends such descendants as present funeral oblations; for one who is not an offerer of oblations confers no benefits, and consequently differs in no respect from the offspring of a stranger or no offspring at all.

First, maiden daughter,

The unmarried daughter is in the first place sole heiress of her father's property. This is proper; for should the maiden arrive at puberty unmarried, through poverty, her father and the rest would fall to a region of punishment.

then one who has, or is likely to have, male issue.

If there be no maiden daughter, the succession devolves on her who has, and on her who is likely to have, male issue.

Barren and widowed sonless daughter excluded.

A daughter does not inherit her father's wealth merely in right of her relation as daughter, but in right of oblations to be presented by her son. Hence, one who is a widow, or is barren, or fails in bringing male issue—as bearing none but daughters or from some other cause—is excluded.

Daughter's son.

The succession of the daughter's son is next after the daughter. As the daughter is heiress of her father's

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[1] XI, 1, 61—64. [2] XI, 1, 65.

LECTURE IX.

wealth in right of the funeral oblation which is to be presented by the daughter's son, so is the daughter's son owner of his maternal grandfather's estate in right of offering that oblation, notwithstanding the existence of kindred, such as the father and others.

If the daughter die without issue, her father's next heirs succeed. It has been already shown that, on the decease of the widow in whom the succession had vested, the legal heirs of the former owner—who would regularly inherit his property, if there were no widow in whom the succession vested, namely, the daughters and the rest, —succeed to the wealth; therefore, the same rule (concerning the former possessor's next heirs) is inferred *à fortiori* in the case of the daughter [and grandson] whose pretensions are inferior to the wife's.

Or the word 'wife,' in the text of Katyayana (quoted above), is employed with a general import; and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance.[1]

Father.

If there be no daughter's son, the succession devolves on the father.

The father's right of succession should be after the daughter's son, and before the mother; for the father, offering two oblations of food to other manes, in which the deceased participates, is inferior to the daughter's son, who presents one oblation to the deceased, and two to other manes in which the deceased participates. He is preferable to the mother and the rest, because he presents (personally) to others two oblations in which the deceased participates.[2]

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[1] XI, 2. [2] XI, 3.

If the father be not living, the succession devolves on the mother. Lecture IX.

Mother.

This too is reasonable, for her claim properly precedes that of the brothers and the rest, since it is necessary to make a grateful return to her, for benefits which she has personally conferred by bearing the child in her womb and nurturing him during his infancy; and also because she confers benefits on him by the birth of other sons, who may offer funeral oblations in which he will participate.

The succession of both parents, then, takes effect, in the order which has been explained, after the descendants of the deceased down to his daughter's son, and before the father's own offspring. In like manner, the succession of the paternal grandfather and grandmother takes place before their own offspring.[1]

Step-mother excluded

The term 'mother' intends the natural parent, and cannot mean a stepmother.[2] Similarly, 'grandmother,' and 'great grandmother' mean natural grandmother and natural great grandmother. As the stepmother, the step-grandmother, and the step great grandmother are not included in the terms 'mother,' 'grandmother,' and 'great grandmother,' and do not consequently partake of funeral repasts provided by the deceased for his immediate ancestors, these stepmothers are excluded from succession.[3]

Brothers.

After the mother, the brothers inherit. That too is reasonable, for the brother confers benefits on the deceased owner by offering three funeral oblations to his father and other ancestors, in which the deceased participates; and he occupies his place, as presenting three oblations to the maternal grandfather and the rest which the deceased was

[1] XI, 4. [2] III, 2, 30. [3] XI, 6. 3.

LECTURE IX.

bound to offer; and he is therefore superior to the brother's son, who has not the same qualifications.

First brother of the whole blood.

Here again, a brother of the whole blood has the first title; and in default of him, a brother of the halfblood inherits.

Then halfbrother.

The succession of the halfbrother is rightly placed between the whole brother and the nephew. The halfbrother is inferior to the whole brother, who presents oblations to six ancestors which the deceased was bound to offer, and also presents three oblations to the fathers and others in which the deceased participates; while the halfbrother only presents three oblations in which the deceased participates. But the halfbrother is superior to the nephew, because he surpasses him in the conferring of benefits, since he offers three oblations of which the deceased participates.

Equal right of associated halfbrother and unassociated uterine brother.

An associated halfbrother, however, divides the succession with the unassociated whole brother.

It thus follows, that "on the demise of the owner, (1) the uterine brothers, who were associated with him, first succeed to his estate, and in the absence of such (2) the unassociated uterine brothers; (3) amongst stepbrothers, he who was associated with the owner is, on the latter's death, first entitled to succession, but in default of him, (4) the unassociated stepbrother. If there be an associated halfbrother and an unassociated whole brother, the succession devolves equally on both." [*This rule is relative to divided immovables.* The undivided immovable estate is, on the death of the owner, equally divided among the whole and halfbrothers.][1]

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[1] But see 23 Weekly Reporter, 395; 24 Weekly Reporter, 234: "The brother of the whole blood succeeds in the case of an undivided estate, in preference to a brother of the half blood."

On failure of brothers, the brother's son is heir. Amongst these, the succession devolves first on the son of an uterine brother; but if there be none, it passes to the son of the halfbrother. The son of the halfbrother, being a giver of oblations to the father of the late proprietor, together with his own grandmother, to the exclusion of the mother of the deceased owner, is inferior to a son of a whole brother (who is a giver of oblations to the grandfather in conjunction with the mother of the deceased).

Lecture IX.

Nephews.

Since the paternal uncle, like the nephew of the whole blood, offers two oblations, which the owner was bound to present to two ancestors with their wives, should not the succession devolve equally on the uncle and nephew of the late proprietor? The answer is, the paternal uncle is indeed a giver of oblations to the grandfather and great grandfather of the proprietor, but the nephew is giver of two oblations to two ancestors including *the owner's father who is principally considered.* He is, therefore, a preferable claimant, and inherits before the uncle.[1]

The nephew excludes the paternal uncle.

The nearer line excludes the more remote.

Accordingly (since superior benefits are conferred by such a successor), the brother's grandson excludes the paternal uncle; for he is a giver of oblations to the *deceased owner's father, who is principally considered.*

But the brother's great grandson, though a lineal descendant of the owner's father, is excluded by the paternal uncle, for he is not a giver of oblations, since he is distant in the fifth degree.

Paternal uncle excludes brother's great grandson.

On failure of heirs of the father down to the great grandson, it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle), in

Sister's son

[1] XI, 6, 5.

Lecture IX.

like manner as it descends to the owner's daughter's son (on failure of male issue, in preference to the brother).

Grand-father's and great grand-father's lineal descendants.

The succession of the grandfather's and great grand-father's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering. His father's or grand-father's daughter's son, like his own daughter's son, transports his manes over the abyss, by offering oblations, of which he may partake.

Maternal kindred.

On failure of any lineal descendant of the paternal great grandfather, down to the daughter's son, who might present oblations in which the deceased would participate, the property devolves on the maternal kindred. It is reasonable that, on failure of kindred who might present oblations in which the deceased would participate, the succession should devolve on the maternal uncle and the rest, who present oblations which he was bound to offer. Since the maternal uncle and the rest present three oblations to the maternal grandfather and other ancestors, which the deceased was bound to offer, therefore the property should devolve on the maternal uncle and the rest, for it is by means of wealth that a person becomes a giver of oblations.

Sakulya, or distant kinsman: sharer of divided oblation.

On failure of paternal and maternal kindred, who are givers of oblations which the deceased shares, or which he was bound to offer, the distant kinsman (sakulya) is successor. The distant kinsman is one who is allied by a divided oblation as the grandson's son or other descendant within three degrees reckoned from him; or as the offspring of the grandfather's grandfather or other remote ancestor.

Among these claimants (whether ascending or descending), the grandson's grandson and the rest are nearest, since they confer benefits by means of the residue of oblations

which they offer. These descendants are, therefore, heirs. On failure of such, the offspring of the paternal grandfather's grandfather inherit in right of oblations presented to the paternal grandfather's grandfather and other ancestors who are sharers of the residue of oblations which the deceased was bound to offer. LECTURE IX.

If there be no such distant kindred, the *samanodakas*, or kinsmen allied by a common libation of water, must be admitted to inherit. Samanodakas.

On failure of these, the spiritual preceptor is the successor. In default of him the pupil is heir. On failure of him likewise, the fellow-student. In default of these claimants, persons bearing the same family name (gotra) are heirs. On failure of them, persons descended from the same patriarch are successors, On failure of heirs as here specified, let the priests take the estate. In default of them, the king shall take the wealth, excepting, however, the property of a Brahmana. A failure of descendants from the same patriarch, and of persons bearing the same family name, as well as of Brahmanas, must be understood as occurring when there are none *inhabiting the same village:* else an escheat to the king could never happen. Strangers.

We will close our Lecture here to-day. The extracts I have given you will enable you to form an accurate idea of the steady growth of the principles of inheritance from the end of the eleventh to the end of the fifteenth century. Vijnanesvara started the theory that consanguinity is the only true basis of the rules of succession. The heritable right should, according to him, be determined by blood-

Lecture IX.

relationship alone; and the preferable right should be regulated by the degree of propinquity in which the person claiming the property stands to the deceased owner. The right to inherit, says Jimutavahana, should be founded upon the right to present exequial cakes; and the preferable right should be regulated by the degree of benefit conferred. Vijnanesvara and Jimutavahana represent two opposite poles of Hindu juridical ideas upon matters of succession. The struggle between the doctrine of consanguinity and the principle of spiritual benefit is maintained with great ardour, and the result is still very doubtful. But we will not anticipate. Let us see how the successors of Vijnanesvara and Jimutavahana have decided the question. The next Lecture will embody their opinions upon this subject.

LECTURE X.

DEVELOPMENT OF THE PRINCIPLES OF INHERITANCE FROM THE SIXTEENTH TO THE EIGHTEENTH CENTURY.



Raghunandana's order of succession — Lineal descendants to the third degree — Widow — Maiden daughter; married daughter; daughter's son — Father — Mother — Brothers — Brother's son—Gotrajas — Bandhus — Sakulyas — *Mitra Misra* on inheritance — Son, grandson, great grandson —Widow — Daughter — Daughter's son — Mother — Father — Brother — Brother's sons—Gotrajas, *i.e.*, *Sapindas* and *samanodakas* — *Bandhus* — Female gotrajas not recognized — Preference among rival claimants determined by the degree of spiritual benefit — *Nanda Pandita* — Son, grandson, and great grandson — Widow — Widowed daughter-in-law — Daughters having a son, or likely to have a son — Daughter's son — Father — Mother — Grandmother — Brothers and sisters — Stepmothers — Brother's and sister's sons — Division among them made according to their number — Sapindas: first, father's kindred, then mother's kindred — Sakulyas — *Balam Bhatta* on heirs: son, grandson, and great grandson — Widow (if her husband died separated from his co-parceners) — Daughters, maiden preferred to married. Indigent married daughter preferred to rich — Daughter's son, daughter's daughter — Father — Mother — Stepmother — Brothers, sisters: brother's son, sister's son, sister's daughter — Brother's sons inherit *per capita* — Gotrajas: 1st grandfather, then grandmother — Predeceased son's widow — The term gotraja includes male and female — Bandhus — Rule of propinquity, key to the order of succession among gotrajas and bandhus — Right of inheritance not co-extensive with competence to offer funeral oblations — Illustration — *Nilakantha* on Inheritance — Son's ownership due to birth — Equal distribution among sons — Division among grandsons made *per stirpes* — Right of son's great grandson. All secondary sons except the adopted not recognized in the *Kali age* — Widow — Daughter: maiden excludes the married. Indigent married excludes wealthy — Daughter's son — Father — Mother — Uterine brother, his son — Gentile relations: first, paternal grandmother — Sister — Paternal grandfather and half-brother — Sapindas and samanodakas — Bandhus, divisible into three classes — Stranger — *Dayakrama Sangraha's* list of heirs. Legitimate sons — Grandson, great grandson. These different classes of heirs may inherit simultaneously — Widow; her right limited to simple enjoyment — She may, however, alienate under extreme necessity — Maiden daughter — Daughter having or likely to have male issue — Barren and sonless widowed daughters excluded — Daughter's son — Father—Mother — Uterine brother — Halfbrother — Associated halfbrother and unassociated uterine brother share equally —

LECTURE X.

Brother's son of the whole blood — Preference given to the associated — Brother's grandson — Father's daughter's son — Brother's daughter's son — Paternal grandfather — Grandmother — Uncle — Uncle's son — Uncle's grandson — Grandfather's daughter's son — Uncle's daughter's son — Paternal great grandfather, great grandmother — Grandfather's brother, his son, and grandson — Great grandfather's daughter's son — Grandfather's brother's daughter's son — Maternal relations — Sakulya or remote kindred, descending and ascending — Samanodakas — Strangers — *Jagannatha* on Inheritance — Right co-ordinate with the gift of funeral cakes — Four persons related through funeral oblations — Sons. Two classes now recognised, *viz.*, begotten and adopted — Right of succession extends to the great grandson — The nearer excludes the more remote — Exceptions to the rule — When the widow's right accrues — Succession of daughter — Priority of the maiden to the married — Benefits conferred by means of funeral cakes not the sole ground of succession — Daughter's son — Brother — Nephews — Other near kinsmen — Nearness equal to proximity by birth and funeral cake — Succession of maternal kindred — Remote kinsmen — *Bandhus.*

DAYATATWA.

By Raghunandana.[1]

[1500.]

Raghunandana's order of succession.

We will begin our Lecture with Raghunandana to-day.

Lineal descendants to the third degree.

The son, the grandson, and the great grandson, according to him, are successively the heirs of a deceased owner, because all of them are equally entitled to present oblations at the *parvana* obsequies.

The share of a deceased brother should be allotted to his son. If the deceased leaves more sons than one, then his share should be equally distributed among them. Likewise the grandson's son shall take; but the great grandson's son is not entitled to a share.

Widow.

On failure of descendants down to the great grandson, the widow takes the heritage.

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[1] Translated by Golap Chandra Sarkar, Sastri, M.A., B.L.

LECTURE X.

In default of the wife, the daughters succeed.

Maiden daughter.

First the maiden daughter, and then the married one.

Married daughter.

Then comes the daughter's son as an heir.

Daughter's son.

The parents follow him. Of these the father is the first heir, and then the mother.

Father. Mother.

The inheritance next devolves upon the brothers. If there be a competition between uterine and stepbrothers, the former exclude the latter; because the uterine brother gives *six* sets of oblations to paternal and maternal ancestors, which the deceased was bound to give; while the halfbrother offers only three sets of oblations to the three paternal ancestors only.

Brothers.

When a person who is reunited dies, his reunited co-heir shall allot his share to his issue. On failure of such issue, the surviving parcener shall take it himself.

A special rule is propounded by Yama on this subject: "Undivided immoveable property goes to *all* the brothers. But never should separated immoveable estate be taken by halfbrothers." 'All,' *i.e.*, all the whole and halfbrothers. The inference is, that with the exception of immoveable property, everything, whether divided or undivided, appertains to the uterine brother alone.

Brother's son.

Failing brothers, their sons are entitled to inheritance. Here also the rule regarding the precedence of uterine and halfbrothers is to be strictly observed.

Gotrajas.

In default of sons of brothers, the *gotrajas* are heirs.

The order of succession among the gotrajas should be determined with reference to two considerations, *viz.*, the degree of benefit which may be conferred, and the proximity of birth of the person claiming to be heir.

It follows then that on failure of sons of brothers, the

LECTURE X.

father's issue ending with his daughter's son inherit the property of the deceased.

Then come the grandfather, grandmother, and their issue, ending with grandfather's daughter's son.

Where a paternal uncle and the son of a deceased paternal uncle compete, although there is no difference in such a case as to the presenting of oblations, which the deceased was bound to offer to the paternal grandfather and the great grandfather, still the paternal uncle succeeds by reason of his proximity of birth. The allotment of shares, according to the proximity of birth, is set forth in the following text: "Among the sons of different fathers, the allotment of shares is according to the fathers."

Then follow the paternal great grandfather, paternal great grandmother, and their issue, ending with great grandfather's daughter's son.

Bandhus.

On failure of persons who offer oblations which may be participated in by the deceased, the *bandhus* succeed. The bandhus are maternal grandfather, maternal uncle, &c. Of these the maternal grandfather first takes the inheritance; then comes the maternal uncle, who offers oblations to the maternal grandfather, &c., which the deceased himself was bound to give.

Sakulyas.

In default of the maternal kindred, *sakulyas,* or kinsmen offering divided oblations, are heirs. These are the descendants below the great grandson, in the line of the deceased himself, as also the decendants in the lines of the great grandfather, &c.

Vrihaspati says: "Where there are many sapindas, sakulyas, and bandhus, he who is the nearest of them shall take the inheritance of a childless man." According to

Vrihaspati, then, bandhus, *i.e.*, bandhus related to the person himself, to his father, or to his mother, are heirs. They are the sons of his own father's sister, &c.[1]

Lecture X.

VIRAMITRODAYA.[2]

By Mitra Misra.

[*End of the 16th century.*]

Mitra Misra on Inheritance.

Son, grandson, great grandson.

The son, the grandson, and the great grandson are successively the heirs of a deceased owner.

All these three descendants equally confer benefit by offering *parvana* oblations. The three descendants beginning with the son confer the greatest amount of spiritual benefit on the three ancestors, father, &c.; consequently, the estate conducing as it does to the benefit of the owner himself when taken by the sons, &c., continues, as it were the owner's own by reason of the proximity of benefit. And propinquity by benefit is consistent with reason. He alone, therefore, is entitled to get the estate on whom the estate being devolved conduces to the greatest benefit of the deceased owner; and in this manner the rule of succession by propinquity is natural and proper.

Widow.

On failure of descendants down to the great grandson, the *chaste* widow of an owner who died separated from his co-heirs is entitled to the inheritance. The widow gets the estate, because she also, failing descendants down to great grandsons, materially benefits her husband by performing his *sraddha*, &c.

Daughter.

In default of the widow, the daughters shall take the heritage.

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[1] *Vide* Mitakshara, II, 6. 1.

[2] Compiled from V. Mandlik's and G. C. Sarkar's Translation.

LECTURE X.

Daughter's son.

Failing daughters, the daughter's son is the next heir. The daughter is entitled to the paternal property simply because she is enabled to benefit her father by offering oblations through her son; and, therefore, it stands to reason that for the very fact of giving the same *pinda*, the daughter's son should inherit the property of his maternal grandfather.

Mother. Father.

On failure of the daughter's son, the parents are heirs. Of these the mother comes in first, and then the father.

Brother.

Failing them, the brothers shall receive the inheritance.

It should be remarked that there are, *apparently*, conflicting texts as regards the order of succession among the heirs mentioned above. These conflicting texts can only be reconciled by the fact that the sages intended that of a multitude of heirs those alone should have a preference who could confer a greater amount of benefit on the deceased proprietor than others. To attempt to reconcile these conflicting texts in any other manner would be utterly futile. The degree of benefit conferred virtually determines the order of succession.

Brother's sons.

The inheritance next devolves on the sons of brothers. Of these the sons of uterine brothers exclude the sons of halfbrothers, there being greater propinquity between the deceased and the sons of uterine brothers. The reason is quite clear. The sons of halfbrothers have a heritable right inferior to that of the sons of full brothers; because the former are not entitled to offer a pinda to the mother of the deceased, but are only competent to present oblations to the father of the deceased and their *own* grandmother.

Gotrajas,

Failing them, *gotrajas* are heirs.

i.e., *Sapindas*

The *gotrajas* are sapindas and samanodakas.

Of the sapindas the grandmother succeeds first. On failure of the father's mother, those who are of the same *gotra*, and are sapindas, such as the father's father and the like, are heirs ; the sapindas belonging to a different gotra being named by the term *bandhu*. Among them, on failure of the father's issue, the father's mother, father's father, father's brothers, and their sons are takers of wealth in order. On failure of the issue of the father's father, father's father's mother, father's father's father, father's father's brothers and their sons inherit. In this way sapindas having the same gotra succeed to the wealth of a sonless male up to the seventh degree. On failure of sapindas, the samanodakas inherit. The samanodakas too are takers of wealth in the order of their propinquity.

LECTURE X.

and *Samanodakas.*

On failure of samanodakas, the *bandhus* or sapindas belonging to a different family, are entitled to the succession. The bandhus are of three classes : the bhandus of the deceased himself, bandhus of his father, and bandhus of his mother. The maternal uncle should be included among bandhus. Otherwise, the exclusion of the maternal uncle, &c., would be the result. And it would be extremely improper that their sons are heirs, while they themselves, though nearer, are not entitled to the inheritance.

Bandhus.

The question may naturally arise, whether female *gotrajas*, or in other words, females sprung from the same family, and the wives of male *gotrajas*, should be recognised as heirs. Mitra Misra seems to be of opinion that males alone and not females are heirs in accordance with the Sruti, "Therefore females are feeble, and are not entitled to inherit." The wife, the daughter, &c., being specifically mentioned, are exceptions to the general rule.

Female gotrajas not recognised.

LECTURE X.

Madhavacharya declared that the text of the Sruti quoted above does not refer at all to the prohibition of females from taking the inheritance, but to the gift and acceptance of the sacrificial *somajuice*, and has no connection whatever with their rights of succession. Madhava may be right, but what should we say to the text of Baudhayana, which ordains that "females do not deserve to succeed, as, according to the Veda, 'Women' are feeble and disentitled to inherit." The objection that may be raised to the text of Sruti quoted above cannot apply to the clear rule laid down by Baudhayana. The fact is undeniable that females are incompetent to inherit; and it is not possible that such a custom is not based upon either Sruti or Smriti. The inference, therefore, is just, that females, with the exception of those already specified, should be excluded from inheritance.

Preference among rival claimants determined by the degree of spiritual benefit.

In conclusion, it should be observed that Mitra Misra is of opinion, that among a multitude of heirs, when it is difficult to decide who should be excluded, and who should be preferred, the degrees of spiritual benefit conferred on the deceased proprietor should determine the preferential right of the claimants to inheritance. We will quote his exact words: "In a multitude of heirs, such as the gotrajas, &c., the benefit conferred by the gift of a *pinda*, &c., on the deceased owner, determines the preferential right; but it can never create the heritable right."[1]

VAIJAYANTI.

By Nanda Pandita.

[1633.]

Son, grandson, and great grandson.

The son, the grandson, and the great grandson are successively the heirs of a deceased owner.

[1] G. C. Sarkar's Edition, p. 39.

LECTURE X.

On failure of these, the chaste widow takes absolutely the moveable and immoveable property of her husband. Widow.

In default of the widow, the surviving wife of a deceased son is entitled to the inheritance. The daughter-in-law inherits the estate, because she is half the body of the deceased son. Vrihaspati says: "Of him whose wife is not deceased, half the body survives; how should another then take the property while half the body of the owner lives." It must not be said that because the daughter derives the different parts of her body immediately from her father, while the daughter-in-law is connected only *indirectly* with her father-in-law, the daughter has a greater claim than the widow of the son. We say that the daughter-in-law should be preferred to the daughter, because the former, being a *sagotra sapinda,* has greater propinquity than the daughter (who by her marriage is transferred to another family, and has thus become a *bhinna gotra sapinda*). Widowed daughter-in-law.

In default of her, the succession devolves upon daughters. That daughter alone who possesses a son, or is likely to have a son, is entitled to the inheritance to the exclusion of childless widows. Though the propinquity of all the daughters is the same, she alone who possesses a son can materially benefit through her son the manes of her father; and for this reason she should take the estate of the deceased. Some hold that if there be a competition between married and unmarried daughters, the latter should exclude the former. We do not agree with these teachers. If there be an unmarried daughter, she should be married first, according to the means of her deceased father, and then she should take her share of the paternal property. Daughters having a son, or likely to have a son.

The daughter's son is the next heir.

In default of him, the father is the heir; and then the right of succession accrues to the mother. Father. Mother.

LECTURE X.

Grand-mother.

In default of the mother, the grandmother shall take the inheritance.

Brothers and sisters.

On failure of her, the brothers are the next heirs. The term brothers includes also the sisters; the propinquity of both the brothers and the sisters being the same to the deceased owner, they also inherit his property.

Step-mothers.

The stepmother shall claim the property of her step-son, immediately after the brothers and sisters.

Brother's and sister's sons.

On failure of her, the succession devolves upon the sons of brothers. Like the sons of brothers, the sons of sisters also have an equal claim to the inheritance; for, as we showed before, there is no difference of propinquity between these two classes of heirs.

Division among them made according to their number.

Among the sons of brothers, the division of the shares should not be according to their fathers, but according to the number of the nephews (*i.e.*, not *per stirpes*, but *per capita*); for the brothers having died before the owner, no right of inheritance could have accrued to them; and, consequently, their sons derived no right from their fathers.

If it so happened, however, that a brother survived the deceased owner, and then died before partition, then the son of this brother should get the share of his father.

Sapindas.

On failure of them, the sapindas are entitled to the inheritance.

Sapindas are those who are connected together by the act of offering the same funeral cake to common ancestors. Manu also has declared that those alone are entitled to the inheritance who are related to the deceased by the act of offering the same funeral cake.[1]

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[1] सपिण्डाः समानपिण्डाः एकपिण्डदानक्रियान्वयिनो भवन्ति। येषामेकपिण्डदानक्रियाख्यस्तेषामेव दायसम्बन्ध इति मनुरपि.

Sapindas may belong to the same general family or not. First those of the same general family (sagotra) are heirs. They are three, the father, paternal grandfather, and great grandfather, as also three descendants of each. The order is this: In the father's line, on failure of the brother's son, brother's son's son is heir. In default of him, the paternal grandfather, paternal uncle, his son and grandson. In this manner the succession passes to the fourth degree inclusive, and not to the fifth: for the text ordains, "The fifth has no concern with the funeral oblations."[1] The daughters of the father and other ancestors must be admitted, like daughters of the man himself, and for the same reason.

LECTURE X.

First, father's kindred.

On failure of the father's kindred connected by funeral oblations, the mother's kindred are heirs, namely, the maternal grandfather, the maternal uncle and his son, and so forth. In default of these, the successors are the mother's sister, her son and the rest.

Then mother's kindred.

In default of sapindas, the sakulyas or the children of the fifth (ancestor, and the fifth descendant, &c.) are heirs.

Sakulyas.

BALAM BHATTA.

[17*th Century*.]

According to Balam Bhatta, the son, the grandson, and the great grandson inherit successively the property of the deceased proprietor.

Balam Bhatta on heirs. Son, grandson, and great grandson.

The widow is the next heir. If the husband died separated from his co-parceners, then the widow is the sole heiress. Otherwise, the brothers exclude her. Some hold, widows are not competent to sell or make a gift of

Widow (if her husband died separated from his copar-ceners).

[1] IX, 186.

LECTURE X.

imoveable property without the consent of reversionary heirs. This opinion is not founded on reason. She gets the *entire* share of her husband both in moveable and immoveable property. The rule, therefore, that applies to moveable property, applies also to the immoveable.

Daughters, maiden preferred to married. Indigent married daughter preferred to rich.

In default of widows, the daughters are entitled to the inheritance. If there be a competition between married and unmarried daughters, the latter are preferred to the former. Of married daughters again, the indigent daughters exclude the enriched.

Daughter's son, daughter's daughter.

The inheritance next devolves upon the sons of daughters.

It should be remarked *once for all* that the masculine gender includes also the feminine gender. So that when you say 'sons' inherit, it must be understood that the inheritance of 'daughters' also is intended.[1] It follows, therefore, that the daughter of the daughter is entitled to the inheritance in default of daughter's sons.

Father.

On failure of her, the parents take the heritage. Of these the father should inherit first, and afterwards the mother; upon the analogy of more distant kindred, where the paternal line has invariably the preference over the maternal kindred, and upon the authority of several express passages of law.

Mother.

Step-mother.

The stepmothers inherit immediately after mothers. The term 'mother' stands in the first instance for *genetrix*, it is true, but it stands also for *stepmother* in default of the natural mother.[2]

Brothers, sisters, brother's son,

The brothers and the sons of brothers then come in successively as heirs. Here it should be remembered that

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[1] Balam पुत्रादिग्रहणेन कन्यानामपि ग्रहणम्.

[2] Balam माता जननी, अभावे सापत्नमातापि मातृपदोक्तेः

Sister's son, sister's daughter.

the term 'brothers' includes *sisters*, and the phrase 'their sons' comprehends also the daughters of sisters. It follows then that the sisters inherit *after* the brothers; the sons of brothers are placed after the sisters; and the daughters of sisters come in as heirs immediately after them.

Brother's sons inherit per capita.

It has been said that among brother's sons, the distribution should be made, through allotments to their respective fathers, and not in their own right, whether there be one, two, or many sons of each brother. That is wrong, for the brethren had not a vested interest in their brother's wealth before their decease; property is only vested in the nephews by the owner's demise. The sons of brothers then, according to Balam Bhatta, inherit *per capita*.

Gotrajas: 1st grandfather, then grandmother.

On failure of them, the *gotrajas* are entitled to the succession; of these the grandfather inherits first, and then the grandmother follows him.

Predeceased son's widow.

A predeceased son's widow should be placed immediately after the grandmother.[1]

The term gotraja includes male and female.

By the term *gotraja*, it must not be understood that the inheritance of males *alone* was intended. The term *gotraja* everywhere includes both males and females. The *bandhus* are entitled to succession after the *gotrajas*.

Bandhus.

Among them also the term 'son' should also comprehend 'a daughter.'[2] Like the sons of *bandhus*, therefore, the daughters of *bandhus* also should take the estate of the deceased.

Rule of propinquity—

In regulating the order of succession among gotrajas and bandhus, the rule of propinquity should be strictly

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[1] Balam पितामहीति भिन्नपदम्, एतदग्रे स्नुषा बोध्या, एवमग्रेऽपि

[2] Balam गोत्रजा इति पुंसामेव ग्रहणमित्ययुक्तम्। अत्रापि [बन्धुष्वपि] पुत्रादिग्रहणेन कन्यानामपि ग्रहणम्।

LECTURE X.

key to the order of succession among gotrajas and bandhus.

observed. Manu says that "the nearest kinsman (sapinda) shall inherit the estate of the deceased sapinda." Propinquity is chiefly dependent upon "the numerousness of the parts of the same body;" so that propinquity varies directly with the degree of corporal connection.[1] He who can show a larger number of bodily parts than another is nearer to the deceased than that other. Corporal connection then is the principal ground of the title to inheritance. The right of succession is mainly grounded upon blood relationship, and does not depend upon any other adventitious cause.

Right of inheritance not co-extensive with competency to offer funeral oblations.

It has been contended that the competence to offer the funeral oblation determines the right of succession. That cannot be right. "The giver of exequial cakes" and "the inheritor of the property" are *not* co-extensive terms. The one is of larger import than the other. One may offer the cakes, and may not necessarily inherit the property of the deceased.[2]

"The numerousness of the bodily parts" is the main ground of determining the title to inheritance, and the competence to offer the exequial cakes plays a subordinate though important part in settling the order of succession. But to say that the right to perform the *sraddha* ceremonies *creates* the title to inheritance is opposed to the spirit and the express passages of the law laid down by the great sages of antiquity.

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[1] Balam अवयवबाहुल्यमेव प्रत्यासत्तेर्मूलकारणम्। Again सा च प्रत्यासत्तिः शास्त्रतो लोकतश्च यथायथम् अवयवबाहुल्यादिद्वारेण बोध्या

[2] Balam पिण्डदत्वप्रयुक्तांशहरत्वस्य न शास्त्रीयत्वमिति अनयोर्मिथो न व्याप्यव्यापकभावो नापि सार्व्वत्रिकं समनैयतत्वम्।

This is abundantly clear from the following facts. The order of succession among kinsmen is as follows:—

Lecture X.

Illustration.

1. The son of the body.
2. The grandson.
3. The great grandson.

Then the other eleven classes of sons, such as the son of the appointed daughter, &c., in regular order.

On failure of them, the widow, the daughter, the daughter's son, and the daughter's daughter are successively heirs.

In default of them the father, the mother, the brother, the sister; and then the son and daughter of brother and sister take the heritage in the stated order.

After these come in the *gotrajas* as heirs of the deceased.

Let us see now in what order kinsmen are entitled to perform the sraddha ceremonies.

First, the son of the body. In default of him, the eleven classes of sons in order.

The grandson and the great grandson are placed after them.

Then even if the wife survives the husband, the brother's son is next entitled to perform the rites.

Then come the brother, the father, the daughter's son in order.

The widow and the daughter are inferior to them.

The *gotrajas* are placed last.

There can be no doubt, therefore, that the right to inherit and the competence to offer the *pindas* are not synonymous phrases.

LECTURE X.

VYAVAHARA MAYUKHA.

By Nilakantha.[1]

[17*th Century.*]

Nilakantha on Inheritance.

By the text, "By birth itself ownership of wealth is gained," it is to be understood that the birth of a son is the cause of his ownership in the father's wealth, which is known as ownership arising from sonship. Ownership does not thus arise by the death of the last full owner, nor by partition, but it arises solely by *birth.*

Son's ownership due to birth.

Equal distribution among sons.

There should be equal partition among the brothers after the death of the father.

Division among grandsons made *per stirpes.*

Yajnavalkya describes the mode of partition among the sons of several brothers:[2] "Among sons by different fathers, the allotment of shares is according to the fathers." The meaning is, that supposing one (father) to have one son, another two, a third three, the division takes place by the number of the fathers only, and not by the number of the sharers. Katyayana:—"If an undivided young brother dies, they should make his son a sharer of the inheritance if he has not obtained a livelihood from his grandfather. He should obtain the share of his father from his paternal uncle, or his (uncle's) son. That very share would indeed be the legal share of all the brothers, or, even his son would receive a share; *beyond* such a son, succession ceases." Here "*beyond*" means beyond the great grandson. The sons, &c., of the great grandson do not obtain wealth of the great great grandfather, if the father, grandfather, and great grandfather have predeceased such great great grandfather, who at his decease has left other sons or other nearer

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[1] Translated by Rao Saheb Vishvanath Narayan Mandlik, C.S.I., M.R.A.S.

[2] II, 120.

heirs alive. The meaning is, that in the absence of sons, grandsons and great grandsons and the like, even he (the great great grandson) takes. This does not refer to the undivided, but to the reunited.

Right of son's great grandson.

There were formerly twelve kinds of sons. But all the secondary sons, except *dattaka* or adopted son, are forbidden (recognition) in the Kali age. This *dattaka* or given son is of two sorts—(1) *kevala* simple, and (2) *dyamushyaya* son of two fathers. The first is given without any condition, the second is one given under the condition that "this son belongs to us both."

All secondary sons except the adopted not recognized in the *Kali age*.

Yajnavalkya thus relates the order of succession to the wealth of one dying separated and not reunited:—"The wife, the daughters also, &c."[1]

On failure of sons, &c., a lawfully-married wife, if faithful to her husband, takes his wealth.

Widow.

In default of the wife, the daughter succeeds. If there be more daughters than one, they should divide the wealth and take shares. Among them also, if some are married and others unmarried, the unmarried alone take the inheritance. Among the married, if some are wealthy and others destitute of wealth, the last only shall take.

Daughter. Maiden excludes the married; Indigent married excludes wealthy.

In default of daughters, the daughter's son succeeds.

In default of the daughter's son, comes the father; in default of him, the mother.

Daughter's son.

In default of the mother, the uterine brother; in default of him, his son. As for the declaration of Vijnanesvara and others that in default of uterine brothers, those by different mothers succeed, and on failure of them, the sons

Father. Mother.

Uterine brother, his son.

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[1] II, 135, 136.

LECTURE X.

of uterine brothers; it is not correct: for to take the word 'brother' as meaning a uterine brother in its primary sense, and also as meaning a brother by a different mother in a secondary sense, is objectionable (as necessitating) a double interpretation of one word at one and the same time.

If the sons of brothers have their fathers alive at the time of the death of a paternal uncle, and on this account have no interest in the wealth (of the paternal uncle), they shall take the share of their father by a division with the other paternal uncles, by the analogy of the rule in the case of sharers with different fathers, "the allotment of shares is according to the fathers" (i.e., *per stirpes*).

Gentile relations. First, paternal grand-mother. Sister.

In default of brother's sons, come the *gotraja sapindas* (gentile relations). Among them the first is the paternal grandmother.

In default of her, comes the *sister;* for, says Manu:[1] "The wealth (of the deceased) goes to whoever is next among sapindas and the rest." Similarly Vrihaspati:—"Where a childless man leaves several clansmen, sakulyas (kinsmen) and bandhavas (relations), whoever of them is the nearest takes the wealth (of the deceased)." Being begotten in her brother's family (gotra), she possesses the qualification of a *gotraja.* The community of *gotra* does indeed not (exist in the case of a sister). But the quality of being a *sagotra* is not mentioned here as being a condition of the right of taking the heritage.

Paternal grand-father and half-brother.

In default of her, the paternal grandfather and the half-brother take in equal shares, because their propinquity is equal, (the former being) the father of the father, and

[1] IX, 187.

Lecture X.

the latter the son of the father of the deceased. In other cases too, where propinquity is equal, and there is nothing specific (to indicate exception), such as the given order in any text and the like, the same rule holds. Therefore, in default of them (*i.e.*, the paternal grandfather and a halfbrother), the paternal great grandfather, the father's brother, and the sons of the halfbrother should divide and take in equal shares.

Sapindas and samanodakas.

All the *sapindas* and *samanodakas* follow in the order of propinquity.

Bandhus.

Divisible into three classes.

In default of *samanodakas* come the bandhus. They are of three classes—(1) one's own cognate kindred, (2) father's cognate kindred, and (3) mother's cognate kindred.

If it be said:—"As the right of the wife and all the rest to inheritance is derived from their relation to the deceased, so let the right of the bandhavas be: what title then can the *bandhavas* of the father or of the mother of the deceased have to the wealth? (The sons of the sister of the father's father, &c.) are only as (denotative of a class) showing the connection between a term and the objects denoted by it, and have no reference to wealth." The answer to that is, that the showing the connection between terms and objects denoted by them is redundant; because even without the said text the word (*viz.*, bandhava) in its primary sense would apply to (those enumerated as) the father's and mother's cognate relations, in the same way as it does to the maternal uncle of the father, the paternal uncle of the father, and the like. Hence the text[1] is intelligible only by the acceptation of the

[1] Mitakshara, II.

LECTURE X.

(enumerated) paternal and maternal *bandhus* as being bandhus in reference to succession to property."

Stranger.

In default of bandhus, the preceptor, the pupil, a fellow-student, a srotriya (a Brahmana learned in the Veda), any other Brahmana, and lastly the *King* are entitled to succession.

DAYAKRAMA SANGRAHA.

By Srikrishna.

[1700.]

Dayakrama Sangraha's list of heirs.

The order of succession to be observed by heirs in regard to the property of a deceased owner, is as follows:—

Legitimate sons.

First his legitimate son succeeds.

Grandson, great grandson. These different classes of heirs may inherit simultaneously.

In default of the son, the grandson takes the inheritance; and failing him, the great grandson. But a grandson whose father is dead, and a great grandson whose father and grandfather are dead, participate equally in the inheritance with the son, for they without distinction confer equal benefits on the deceased owner of the property by the presentation to him of funeral offerings at solemn obsequies.

But during the lifetime of their parents, neither the grandson, nor the great grandson, is entitled to the inheritance, since they do not confer any benefits on the deceased by the presentation of the funeral offering at solemn obsequies.

Widow.

In default of the son, grandson, and great grandson, the widow succeeds to the estate.

Her right limited to simple enjoyment.

The widow is only to enjoy the estate of her deceased husband; she must not make a gift, mortgage, or sale of it. So Katyayana declares, "Let the childless widow preserving unsullied the bed of her lord, and abiding

with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

LECTURE X.

"Abiding with her venerable protector," that is, having settled with her father-in-law, in her husband's family, let her so long as she lives enjoy her husband's estate, and not (as she is entitled to do with her peculiar property), make at will a gift, mortgage, or sale of it.

This use even should not be made by wearing delicate attire, or indulging in other luxuries; but since a widow benefits her husband by the preservation of her body, the use of property for the attainment of this object is permitted. In like manner, she may make a gift or other disposal for the sake of completing the funeral rites of her husband. But if the widow be unable to subsist otherwise, she may mortgage the property; and, if even then unable, she may sell it.

She may, however, alienate under extreme necessity.

In default of the wife, the daughter next succeeds.

Maiden daughter.

The unmarried daughter is first entitled to the succession.

The following special rule must be here observed, namely, that if a maiden daughter in whom the succession had once vested, and who was subsequently married, should die without having borne issue, the married sister who has, and the sister who is likely to have, male issue, inherit together the estate which had so vested in her. It does not become the property of her husband or others, for their right is exclusively to a woman's separate property (stridhana).

Daughter having, or likely to have, male issue.

But if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession, and on failure of either of them, the other takes the heritage, because both

LECTURE X.

descriptions of daughters [appointed or not appointed], confer without distinction benefits on the deceased owner, by presenting to him through their sons funeral oblations at solemn obsequies.

Barren and sonless widowed daughters excluded.

Daughters who are barren, or widows destitute of male issue, are incompetent to take the inheritance, because they cannot benefit the deceased owner by offering (through the medium of sons) the funeral oblations at solemn obsequies.

Daughter's son.

In default of all daughters [who are entitled to succeed], the daughter's son takes the inheritance according to the text (of Manu, IX, 132), "Let the daughter's son take the whole estate of his own (mother's) father who leaves no son; and let him offer two funeral oblations, one to his own father, the other to his maternal grandfather," and other texts of a like import.

Father.

If there be no daughter's son, the father is next entitled to the succession, because he (the father) confers benefits on the deceased owner by the presentation of two funeral oblations (namely, to his own father and grandfather) in which the deceased owner participates.

Mother.

In default of the father, the succession devolves on the mother, for the mother confers benefits on the deceased owner by the birth of his brother, who offers three funeral oblations to the father, grandfather, and great grandfather of the deceased owner in which he participates.

Uterine brother.

On failure of the mother, the succession goes to the uterine or whole brother, who offers three funeral oblations to the father, grandfather, and great grandfather of the deceased owner in which he participates.

Halfbrother.

If there be no uterine or whole brother, the halfbrothers of the same class with the deceased are entitled to the

succession, since they also offer three funeral oblations to the father and the other ancestors abovenamed of the deceased owner in which he participates.

LECTURE X.

If there are two brothers, the one uterine and the other a halfbrother, and both were unassociated with the deceased owner, the uterine brother exclusively takes the wealth of his uterine brother.

Associated halfbrother and unassociated uterine brother share equally.

Where an associated halfbrother and an unassociated whole brother are the competitors for the succession, it devolves equally on both of them.

Where uterine and halfbrothers compete, and both were associated with the deceased, the associated whole brother exclusively takes the inheritance, for in this case he possesses a double title [namely, his being uterine and also associated].

The same order of succession must likewise be observed in the case of nephews of the whole and nephews of the half blood.

Brother's son of the whole blood.

In default of brothers, the brother's son of the whole blood is the successor, and not a nephew of the halfblood, who confers less benefits compared with the brother's son of the whole blood, since the mother and grandmother of the deceased owner do not participate in the oblations presented by the nephew of the halfblood to the father and grandfather [of such deceased owner].

Preference given to the associated.

Among brother's sons associated and unassociated, all of the whole blood, the succession devolves exclusively on the associated brother's son.

In like manner, in the case of associated and unassociated brother's sons, all of the half blood, the succession devolves on the associated brother's son of the halfblood.

But if the son of the whole brother were unassociated,

LECTURE X.

and the son of the halfbrother associated, then they both inherit together.

Where, however, two nephews were either associated or unassociated with the deceased, one of the whole, the other of the halfblood, then in both instances the succession devolves on the nephew of the whole blood.

Brother's grandson.

If there be no brother's son, the brother's grandson is heir, both because he presents one funeral oblation [namely, to the deceased owner's father, *i.e.*, his own great grandfather] in which the deceased owner participates, and because he is within the degree of relationship termed (sagotra) 'sapinda.'

But brother's great grandsons do not inherit, since they confer no benefits, because they stand in the fifth degree of relationship to the father of the deceased owner.

Here likewise the distinction of the whole blood and of the halfblood, as in the instance of brother's sons, must be observed.

Father's daughter's son.

On failure of the brother's grandson, the succession goes to the father's daughter's son, for he presents three funeral oblations, namely, to the father, paternal grandfather, and paternal great grandfather of the deceased owner, *i.e.*, to his own maternal grandfather, and maternal great grandfather, and maternal great great grandfather.

Brother's daughter's son.

In default of the father's daughter's son, the brother's daughter's son succeeds, for he presents two funeral cakes in which the deceased owner participates, namely, to his (the owner's) father and paternal grandfather.

Paternal grandfather.

Failing him, the paternal grandfather is the successor, for as the father is entitled to succeed on failure of the heirs of the deceased owner ending with the daughter's son, so by the rule of analogy the succession devolves on

the grandfather in default of heirs down to the father's daughter's son; and because he presents one oblation (namely, to the owner's paternal great grandfather, *i.e.*, his own father) in which the deceased owner participates.

Grandmother. In default of the paternal grandfather, the paternal grandmother is heir. As the mother succeeds on the death of the father, so by the rule of analogy the succession devolves on the paternal grandmother in default of the paternal grandfather.

Uncle. Failing the paternal grandmother, the uncle succeeds, for he presents two oblations to the paternal grandfather and great grandfather of the deceased owner (*i.e.*, his own father and grandfather) in which the said owner participates.

Uncle's son. In his default, the succession devolves on the uncle's son, for he [also like his father] presents two oblations in which the deceased owner participates, namely, to the owner's paternal grandfather and paternal great grandfather [*i.e.*, his own paternal grandfather and great grandfather].

Uncle's grandson. Failing him, the uncle's grandson succeeds, for he presents one oblation, namely, to the paternal grandfather of the deceased owner [*i.e.*, his own paternal great grandfather] in which the said owner participates.

Grandfather's daughter's son. Failing the uncle's grandson, the succession devolves on the grandfather's daughter's son, because he presents two oblations in which the deceased owner participates, namely, to the owner's paternal grandfather and paternal great grandfather [*i.e.*, his own maternal grandfather and maternal great grandfather]. Notwithstanding the grandfather's daughter's son, who presents two oblations in which the deceased owner participates, confers greater benefits than the uncle's grandson, who presents but one oblation in which

Lecture X.

the deceased owner participates, yet nevertheless the right of succession devolves in the first instance on the uncle's grandson by virtue of his relationship to the deceased owner in the degree termed (sagotra) *sapinda*.

Uncle's daughter's son.

In default of the paternal grandfather's daughter's son the uncle's daughter's son succeeds, because he presents two oblations in which the deceased owner participates, namely, to the owner's paternal grandfather and great grandfather [*i.e.*, his own maternal great grandfather and great great grandfather].

Paternal great grandfather, great grandmother.

Then succeed in order the paternal great grandfather and the paternal great grandmother, because of the deceased owner participating in the oblations offered to the paternal great grandfather, and also by reason of the rule of analogy abovementioned.

Grandfather's brother, his son, and grandson.

Next succeed in order the paternal grandfather's brother, his son, and grandson, for they present one oblation in which the deceased owner participates, namely, to the owner's paternal great grandfather.

Great grandfather's daughter's son.

Afterwards the paternal great grandfather's daughter's son takes the succession, since he presents an oblation in which the deceased owner participates, namely, to the owner's paternal great grandfather [*i.e.*, his own maternal grandfather].

Grandfather's brother's daughter's son.

Next the succession devolves on the paternal grandfather's brother's daughter's son, who presents an oblation in which the deceased owner participates, namely, to the owner's paternal great grandfather [*i.e.*, his maternal great grandfather].

Maternal relations.

In his default, the maternal grandfather of the deceased owner succeeds.

Failing him, the maternal uncle, his son, and grandson.

In default of the maternal uncle's grandson, the maternal grandfather's daughter's son succeeds.

Failing him, the maternal great grandfather, his son, grandson, and great grandson.

In their default, the maternal great grandfather's daughter's son succeeds.

Failing him, the maternal great great grandfather, his son, grandson, great grandson.

In default of these, the maternal great great grandfather's daughter's son succeeds.

Sakulya or remote kindred.

On failure of the heirs who present oblations in which the deceased owner participates, the 'sakulya' takes the inheritance.

The sakulya, or remote kindred, is of two descriptions: 1st, descending, and 2nd, ascending.

Descending and ascending.

The first includes the great grandson's son, and the rest down to the third degree in the descending line. The second intends the great grandfather's father and other ancestors up to the third degree in the ascending line.

Here the distant kinsmen in the descending line first obtain the inheritance, according to their respective order, since the deceased owner partakes of the remainder of the oblations which they present.

In their default, the distant kindred, as far as the third degree in the ascending line, inherit in due order; since the deceased proprietor participates in the remainder of funeral oblations made to his great great grandfather, and the other ancestors, three in all: and their offspring present oblations to those three who are partakers of the remainder of oblations which it belonged to the deceased owner to make.

Samanodakas.

If there be no distant kindred of this description, the

Lecture X. *samanodakas*, or kinsmen allied by common libations of water, inherit.

Strangers. On failure of these the spiritual preceptor is the successor.

In default of him, the pupil is heir.

On failure of him, the fellow-student of Vedas.

In his default, persons bearing the same family name, being inhabitants of the same village, succeed.

On failure of them, persons inhabiting the same village, and descended from the same patriarch.

On failure of all heirs as here specified, Brahmans, inhabitants of the same village, endowed with learning in the three Vedas, and other qualities, are the successors.

In default of them, the wealth goes to the KING.

JAGANNATHA.

[1793.]

Jagannatha on Inheritance. [1] That property, on which a distribution or partition of a vested right, depending on relation or consanguinity, may be instituted, is named distributed heritage.

[2] That distribution, participation or ownership of the paternal estate (or wealth descending from the father in consequence of his death or the like, or, in other words, the property of the deceased father), which is established or acknowledged by the sons to vest in a certain owner, is a term of law relative to ownership. Consequently, from the relation of the term, ownership itself being the title of law, the property of the estate, which belonged to a deceased owner, being vested *in another* by reason of consanguinity, is inheritance.

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[1] Colebrooke's Digest, Vol. II, page 184. [2] *Ibid*, 185.

LECTURE X.

[1] "Sages declare partition of inheritable property to be co-ordinate with the gift of funeral cakes" (Devala).

Right co-ordinate with the gift of funeral cakes.

As far as the fourth in descent, relatives or persons sprung from the *same* family are *sapindas:* for example, one gives the funeral cake, the other three receive the oblation; hence there is a mutual connection by the gift and receipt of funeral cakes between four persons. And this connection of sapindas regards inheritance; but the connection of sapindas in respect of impurity by reason of the dead extends to the seventh in descent, including the ancestors who partake of the rice wiped off the hand with which the funeral balls were offered. Beyond the fourth in descent, the funeral cake is rescinded, for there is not, between more distant relatives, the mutual connection of giving and receiving the funeral balls.

Four persons related through funeral oblations.

Sons. Two classes now recognised, *viz.,* begotten and adopted.

[2] Sons are of two sorts, by birth and by adoption; the son lawfully begotten and the rest are six sons properly so called; the son given and the rest, are six sons improperly so denominated: the chief of each set, the son lawfully begotten and the son given in adoption, are approved in the Kaliage. Accordingly Vrihaspati describes the appointed daughter as superior to the son given; *their relative* superiority and inferiority depend not on piety. This, which is quoted as the opinion of some lawyers, is accurate. But in fact all sons, whether born of a twice-married woman and the like, or given in adoption and so forth, are heirs to kinsmen as well as to their own fathers; yet if void of good qualities they shall not take the heritage of a kinsman: however, they shall have the shares of the paternal estate allotted to them by the Brahma Purána and other authorities, but some shall have a maintenance only. It

[1] Colebrooke's Digest, Vol. II, page 243. [2] *Ibid*, 406.

LECTURE X.

appears to be the present practice for a son given in adoption, who performs the acts prescribed to his class, whether constant, occasional or voluntary, such as sacrifice, consecration of pools, and so forth, to take the inheritance of his paternal uncles and the rest.

Right of succession extends to the great grandson.

[1] Manu declares the right of succession to extend to the great grandson. To three—to the father, the paternal grandfather, and great grandfather—water must be given in the form of an oblation; for three, for the father and the rest, is the funeral cake ordained in the double set of oblations; the fourth in descent is the giver of funeral cakes and water to them, *viz.*, to the father and the rest: a precept ordaining the gift of funeral cakes being inserted under the title of succession to heritage, the benefit conferred on ancestors by descendants, down to the great grandson, is exhibited as the ground on which they inherit the estate.

The nearer excludes the remote.

[2] The nearness or proximity of kinsmen is a requisite condition under the text of Manu: consequently, he who is nearer of kin to the proprietor than any other living claimant, shall take the estate left by him: does it not follow that the grandson whose own father is dead has not a present title, since he is more distant than the surviving son? The answer is, this text (of Manu, IX, 186) relates only to the claims of sapindas. A son's son has a right of succession merely as he is the perpetuated body of his ancestor: and he really did spring from the person of his grandfather; for a text expresses "the bodies of ancestors are born again of her." Although the legislator, having declared three, the son and the rest, to be sapindas, seems to ordain the succession of him amongst them who is nearest of kin, and although this text

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[1] Colebrooke's Digest, Vol. II, page 518. [2] *Ibid*, 521.

do not allude to the *sapindas* described by Baudhayana, still the following rule of decision must be established to reconcile it with the texts of Baudhayana and Katyayana:— He among sapindas (meaning those who are noticed by the same legislator, namely, the son, grandson, and the great grandson in the male line) who is nearer of kin than any other living claimant, shall take the estate; but the grandson whose father is dead is not more distant than his surviving uncle, for he belongs to another line of descent. Thus some expound the law. But Kulluka Bhatta holds that this text would be superfluous, if it solely related to such *sapindas* as are *lineal* descendants born in lawful wedlock and the like; it must be, therefore, intended to authorise the succession of a wife and others not mentioned by the legislator: "To the nearest *sapinda* (male or female) the estate of the deceased shall belong." Here that term intends such as have been mentioned by Baudhayana; and a wife must be considered as a sapinda, because she assists *her husband* in the performance of religious duties.

LECTURE X.

Exceptions to the rule.

[1] A son, a son's son, and the son of a grandson have a fair title to the estate of a deceased proprietor, although the grandson and the greatgrandson be more distant than the surviving father or paternal grandfather of the late proprietor; but who shares the heritage on failure of them?

When does the widow's right accrue?

In the first place, the wife is heir to the estate of such a deceased proprietor. The widow has not power to give away the estate; after her demise, it devolves on the legal heirs of her husband.

[2] On failure of her, the estate descends to the daughter, by the text of Yajnavalkya, and the rule of Vishnu.

Succession of daughter.

[1] Colebrooke's Digest, Vol. II, page 522. [2] *Ibid*, 542.

LECTURE X.

Parasara says:—"The unmarried daughter shall take the inheritance of the deceased who left no male issue; and on failure of her, the married daughter."

Priority of the maiden to the married.

[1] On failure of unmarried daughters, a married one claims the heritage by the text of Parasara above cited. A distinction is admitted in respect of married daughters. She who may possibly have a son, and she who actually has male issue, shall alone take the inheritance, not she who is barren or widowed; neither a daughter whose son is dead, but who has a son's son, nor she who has female issue, inherit, though they were not barren.

Benefits conferred by means of funeral cakes not the sole ground of succession.

[2] It should not be argued, that benefits conferred through the oblation of the funeral cake in the *parvana* constitute the sole ground on which rests the right of succession to the property left by *a man*, as appears from the text of Manu immediately following the text above cited (IX, 186, 187); but any benefit whatsoever is sufficient foundation of a title to inherit the several property of *a woman*. There is no authority for such an inference; and pupils and the rest, though not conferring such benefits, do succeed to the property left by a *man*. Nor should it be answered, they who afford not such advantages only inherit the estate left by a *man*, on failure of persons conferring benefits through the oblation of a funeral cake in the *double set* or *parvana;* were it so, the succession of a daughter would be contrary to law. Nor should it be argued in reply, that she confers such benefits through the means of her son: were it so, a sister, a father's sister, and the rest, would also claim the heritage.

Daughter's son.

On failure of female issue, the son of a daughter is heir, according to Jimutavahana and Raghunandana. If

[1] Colebrooke's Digest, Vol. II, page 543. [2] *Ibid*, 544.

daughter's sons be numerous, a distribution must be made. In that case, if there be two sons of one daughter and three of another, five equal shares must be allotted: they shall not first divide the estate into two parts, and afterwards allot one share to each son; for such a mode of distribution is only ordained in partition among the sons of sons, and the reasoning is not equal, for a son's son, whose own father is dead, receives a share from his uncle; but the daughter's son, whose mother is deceased, does not receive a share from his mother' sister.[1]

The father is heir on failure of a daughter's son; and the mother in default of the father; the opinion of Jimutavahana and the rest is respected by many lawyers as that which should be now followed in practice.

Brother.

On failure of the mother, brothers take the estate.

Nephews.

[2] On failure of them, the son of a brother is heir by the texts of Yajnavalkya and Vishnu, and because he offers two funeral cakes to ancestors of the late proprietor, one to his father, the other to his paternal grandfather.

Other near kinsmen.

[3] On failure of him, the son of a nephew shall inherit by the text of Yajnavalkya; for kinsmen related by the funeral cake are determinately intended by the terms kindred sprung from the same original stock; and the succession of the nearest sapinda is ordained by the text of Manu.[4] After the brother's grandson, the son of the father's daughter is the next heir.

Whether proximity by birth, or by the relation of the funeral cake, be *preferred*, the paternal uncle is in both views nearer *of kin* than the grandson of a brother; for he is son of the father of the *late* proprietor's father, and

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[1] Colebrooke's Digest, Vol. II, page 549. [2] *Ibid*, 560. [3] *Ibid*, 564.
[4] IX, 187.

LECTURE X.

offers two funeral cakes which he was bound to present, and surely the paternal grandfather is nearer of kin, for he is father of the late proprietor's father, would have shared the funeral cake offered by him, and gives an oblation, which he was bound to present to the paternal great grandfather.

Nearness equal to proximity by birth and funeral cake.

Would not the brother of the paternal grandfather be in like manner heir, although a great grandson of the same ancestor be living; and would he not have an equal claim with the grandson of the paternal grandfather? To this we reply, 'nearest' (in the text of Manu) signifies proximate both by birth and by the funeral cake; consequently, he who is nearest of kin to the late proprietor by birth and by the funeral cake, and who is most immediately connected both by descent and by oblations, shall take the property. It should not be objected whence is this deduced, and why is not proximity to the deceased proprietor solely propounded? Nearness of kin is not the sole cause of succession, but connection by the funeral cake does also cooperate, and hence it appears that the benefits conferred are the grounds of the claim. Now the benefits conferred by the nearest of kin are more important than those afforded by one who is more distantly related; remote kindred ought, therefore, to inherit only on failure of nearer kinsmen. Thus since the son of a daughter confers benefits by the oblation of a funeral cake, and since it is recorded in the Mahabharata that even his birth alone is beneficial to his maternal grandfather, therefore the son of a daughter conferring benefits on her father, is mentioned by Jimutavahana as heir on failure of the great grandson in the male line. The order of succession by nearness of kin is proximate to the proprietor himself. Hence a person, who

confers benefits on the last possessor himself, is first heir. After him the father of the late proprietor, being most near; if he be dead, the persons who confer benefits on the father in the order of proximity to him; on failure of these, the paternal grandfather and the rest comparatively near; on failure of the ancestor, he who confers benefits on him may inherit the estate. LECTURE X.

Srikrishna Tarkalankara, author of a commentary on the Dayabhaga, contends on the reason of the law, that the son of a son's daughter, and the son of a grandson's daughter, also claim the inheritance, because they confer benefits on their maternal great grandfather and on the father of the maternal great grandfather. How can a daughter's son and the rest be considered as kinsmen sprung from the same original stock? Because the term is used in the sense of race or lineage anyhow descending therefrom, and the son of a daughter mediately springs from that stock. It should not be objected that were it so, a sister and the rest might claim inheritance, because they confer benefits by means of their son or other descendant. Their claim is obviated by a text above cited,[1] and by Baudhayana declaring women to be in general incapable of inheritance: this does not contradict the right of wives and the rest, which is propounded by special texts.

On failure of the father's issue, including his daughter's son, the paternal grandfather is heir to the property, because he is nearest to the deceased; on failure of him, the paternal grandmother. On failure of them, their issue, including the son of a daughter, shall inherit.

Next, on failure of issue of the paternal grandfather,

[1] Colebrooke's Digest, Vol. II, page 538.

Lecture X.

including his daughter's son, the paternal great grandfather is heir; in default of him, the paternal great grandmother, because she shares the funeral cakes offered by her great grandson. This observation of Jimutavahana and Raghunandana should be respected. It must not be argued that, in the absence of an express law, her succession is forbidden by the general maxim above cited. A man should not affirm of his own authority that no such special ordinance exists, for the ocean of the law has not been traversed. On failure of her, the descendants of the paternal great grandfather, including his daughter's son as before, successively claim the inheritance.

Succession of maternal kindred.

[1] In default of issue of the paternal great grandfather, including his daughter's son, the maternal grandfather and the rest, who would have shared the funeral cakes which the deceased would have been bound to offer; and they who present cakes to such ancestors inherit in the order of proximity, *viz.*, the maternal grandfather, the maternal uncle, his son, and son's son; the maternal great grandfather, his son, son's son, and grandson's son; the father of the maternal great grandfather, his son, son's son, and grandson's son. On failure of the first respectively the next in order is heir. Again, their daughter's sons have a title as givers of funeral cakes to the maternal grandfather, to his father, and to the father of this maternal great grandfather. Consequently, on failure of issue of the maternal grandfather, including his daughter's son, the descendants of the maternal great grandfather, also including his daughter's son, successively take the inheritance. In this sense does Yajnavalkya use the

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[1] Colebrooke's Digest, Vol. II, page 567.

term *kindred.* Such is the rule approved by Srikrishna Tarkalankara, who follows the opinion of Jimutavahana. LECTURE X.

It should be here remarked that the son of a son's and of a grandson's daugther, and the son of a brother's and of a nephew's daughter, and so forth, claim succession in the order of proximity before the maternal grandfather, for they also confer benefits by the oblation of funeral cakes. It must not be objected that were it so the son of a grand-daughter would have a prior title, even though the father be living, inasmuch as he gives a funeral cake to the *deceased* himself. The oblations presented to the maternal grandfather and the rest are secondary, because they must follow funeral cakes offered to the paternal ancestors; the son of a grand-daughter can have no claim while the giver or sharer of a principal oblation exists. Nor should it be objected as a consequence that the son of the late proprietor's daughter, or of his father's daughter, and so forth, could have no title, if any kinsman within the degree of a sapinda were living. The Mahabharata showing that a daughter's son procures advantage even by his birth alone, it appears that he does confer important benefits. Such is the succession of maternal kindred.

On failure of them a distant kinsman allied by family (sakulya) is heir. They who are partakers of the rice and clarified butter wiped off the hand, with which the funeral cakes have been offered, are *sakulyas.*

In the first place, the son of the great grandson is heir, because he offers the remains of the funeral cake to the proprietor, to his father, and to his grandfather; next, the grandson of the great grandson; and after him the great grandson of the great grandson in the male line. On failure of these, the paternal grandfather's paternal grand-

LECTURE X.

father, because he would have shared the remains of the funeral cake wiped off by the proprietor for the sake of ancestors; if he be dead, his son and other descendants to the third degree have successive claims. On failure of these, the daughter's son of the paternal grandfather's paternal grandfather, and other givers of a funeral cake in the triple set of oblations, inherit in order. In default of them, the son, grandson, and great grandson of the great grandson of the grandfather's grandfather in the male line have successive claims as givers of the remains of funeral cakes to the paternal grandfather's paternal grandfather. On failure of them, the paternal great grandfather's paternal grandfather is heir; if he be dead, his son, grandson, or great grandson in the male line, his daughter's son, the son of the great grandson in the male line, and the son of that great grandson's son, and the son of this last-mentioned descendant have successive claims as before. On failure of them, the paternal great grandfather's paternal great grandfather, his son, grandson, and great grandson, his daughter's son, the son, grandson, and great grandson of his great grandson similarly inherit in order.

On failure of all these the *samanodakas*, or persons connected by an equal oblation of water, have a right to the inheritance. Now the relation of *samanodakas* extends to the fourteenth person.

Remote kinsmen.

[1] Among these the eighth ancestor and his son, grandson, great grandson, daughter's son, and the rest, as far as the fourteenth in descent counted from the eighth ancestor, successively claim the inheritance. The same must be understood in respect of the ninth ancestor and the rest, for

[1] Colebrooke's Digest, Vol. II, page 569.

nearness of kin and superior benefits are entitled to respect in every case. Men connected by equal oblations of water are allied by family; and on failure of such kinsmen as partake of the remains of funeral cakes, those who are connected by equal oblations of water are heirs, as suggested by the term "kinsmen allied by family," for it is so remarked by Jimutavahana. Such is the succession of remote kinsmen.

We have come at last to the end of our analysis. I must have tired out your patience. The following tables will give you a comparative view of the Laws of Succession. If you have followed me step by step in the historical investigation of the subject, you must have noticed with interest the gradual elaboration of the principles of Inheritance. The germs planted in the Vedic soil have developed into a large tree, whose broad branches now overspread the whole country. The *five* Schools of Law have grown out of the cogitations of primeval sages, who could have never dreamt that their simple saws and sayings would build up such a vast fabric in the remote future. The mediæval sages worked up the ideas they found in the Vedic writings, and handed down to their successors principles which have been productive of innumerable changes in the social order. The ball has gone on rolling ever since, and each succeeding legislator,—from the great anchorite of *Kalyana* to the philosophic lawyer of *Tribeni*,—has been adding impetus by the force of

LECTURE X.

his genius to its never-ceasing motion. Foreign jurists are now combining their strength with that of Hindu lawyers of the present day, and the very best results can be fairly expected from their united efforts to adapt the ancient laws to the present state of progress.

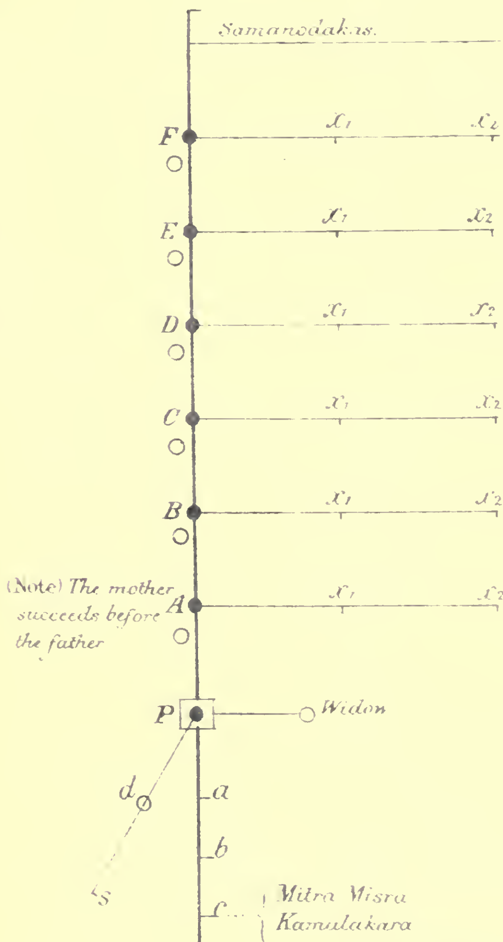
TABLE OF SUCCESSION.

I

BENARES SCHOOL

Authorities

1 *Vynanesvara* — *Mitakshara* — — 1076
2 *Visvesvara Bhatta* *Madanaparijata*
3 *Madhavacharya* — — — — [illegible]
4 *Mitra Misra* — *Vira Mitrodaya* — —
5 *Kamalakara* — *Vivadatandava* — — 16[illegible]

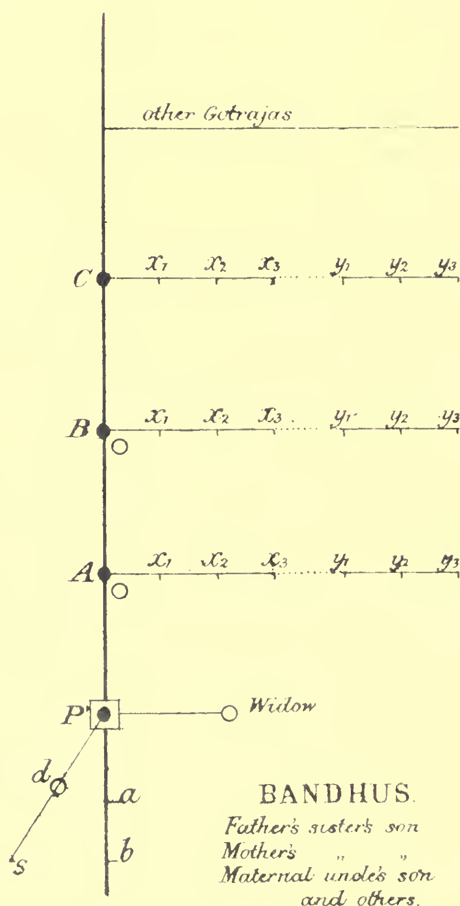


BANDHUS

Fathers sister's son — —	(1) Own	(2) Father's	(3) Mother's
Mothers "	do	do	do
Maternal uncle's "	do	do	do
Maternal uncle	do	do	do

added by Mitra Misra

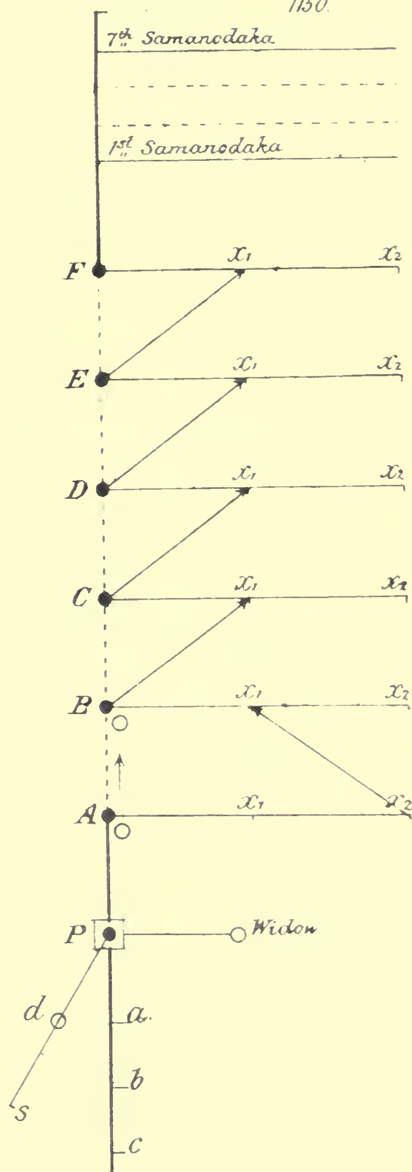
TABLE OF SUCCESSION.
II
GENERAL
Apararka — 1125.



(Note) *The mother succeeds after the father*

TABLE OF SUCCESSION.
III.
DRAVIRA

Devananda Bhatta
Smriti Chandrika
1150.



The table reads Bx_1 Bx_2 B_1 Cx_1 Cx_2 C. and so on

TABLE OF SUCCESSION.
IV.
MITHILA.

Chandesvara — Vivadaratnakara — 1314.
Vachaspati Misra — Vivadachintamani —

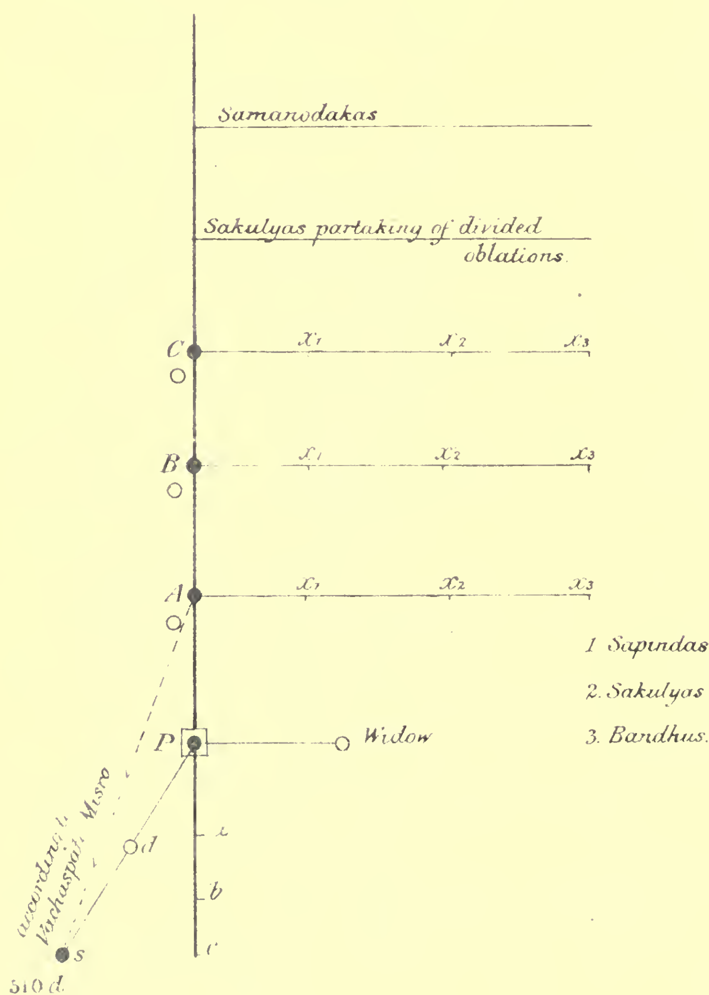


TABLE OF SUCCESSION.

V.

I. BENGAL SCHOOL.

<u>Authorities</u>

Jimutaváhana — Dayabhága — 15th Century.
Raghunandáná — Dayatatwa — 1500.
Sri Krishna Tarkalankara — Dayakrama Sangraha
Jagannatha ——— 1793

Sapindas Ex parte paterna

(Jimutaváhana).

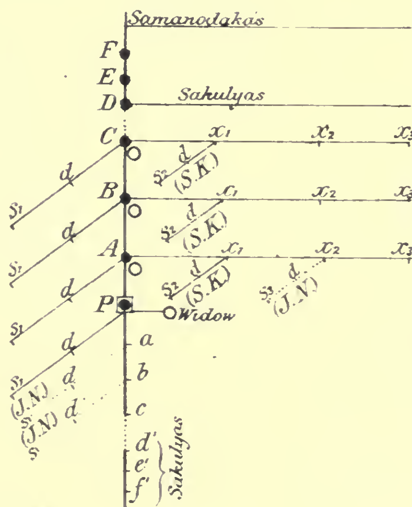


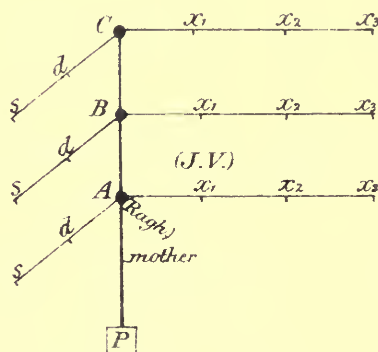
TABLE OF SUCCESSION.

V.

2. BENGAL SCHOOL.

Sapindas Ex parte materna.

(Sri Krishna).



A represents mother's father
B " " grandfather
C " " great grandfather

TABLE OF SUCCESSION.

V.

3. BENGAL SCHOOL.

(Note)
The tables read
Pd', Pe', Pf';
D Dx1 Dx2 Dx3
Ds1 Ds2.... Dy1 Dy2
and so on

Sakulyas.

(Jagannatha).

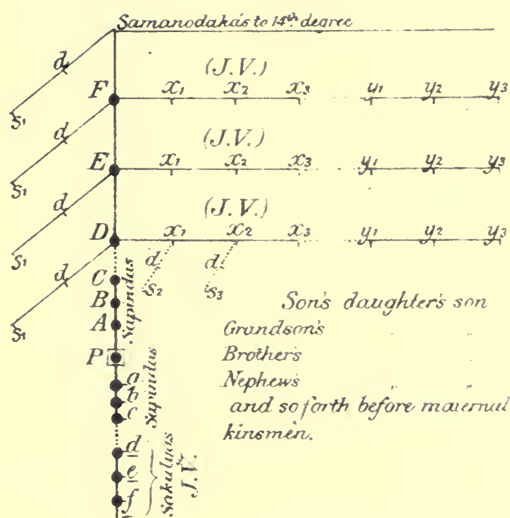


TABLE OF SUCCESSION.
VI.
BENARES.

Nandapandita
Kesava Baijayanti 1633.

Sapindas Ex parte pâterna.

C x_1 x_2 x_3
B x_1 x_2 x_3
d
A x_1 x_2 x_3
d
Step mother
Sister d
P Widow
s
d
a Son's widow
b
s
c

Sapindas Ex parte materna.

(maternal grandfather) A x_1 x_2 x_3
d
s
mother
(and others)
P

TABLE OF SUCCESSION.
VII.
MAHARASHTRA.

Nilkantha
Vyavaharamayukha
17th Century.

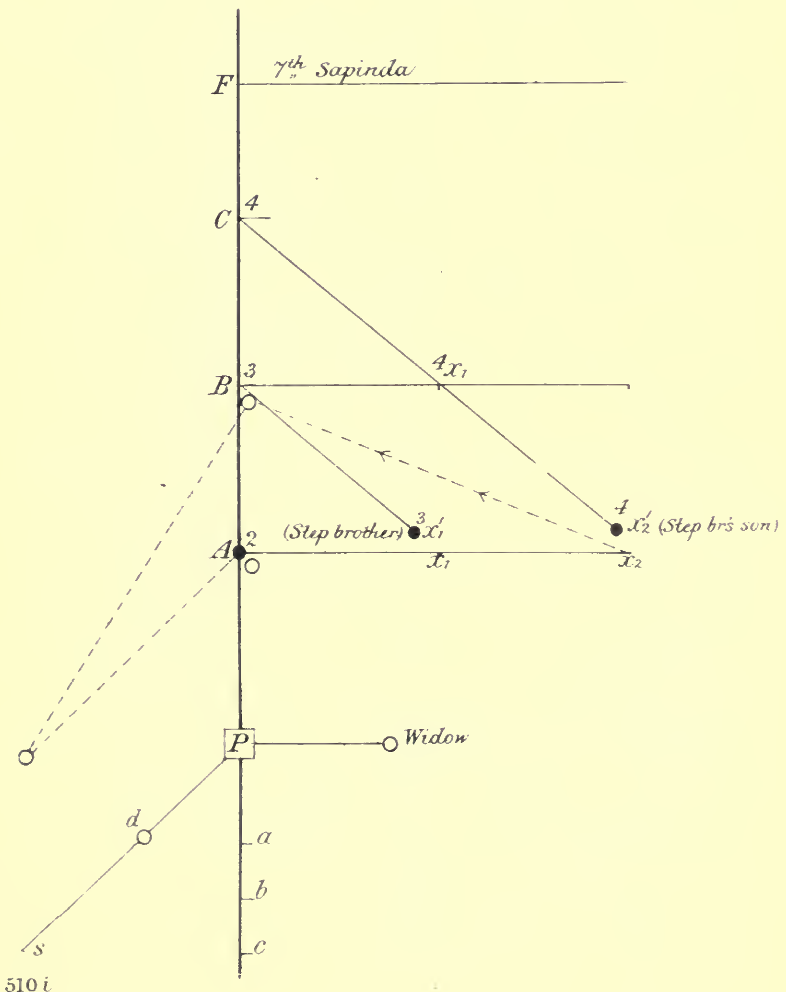
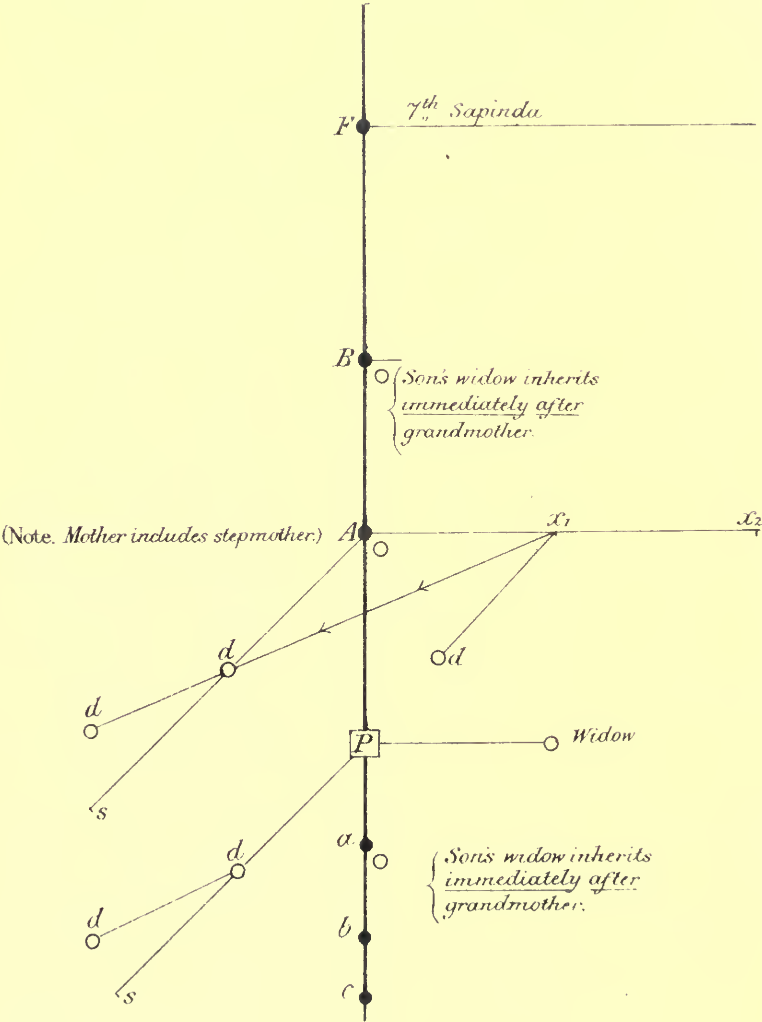


TABLE OF SUCCESSION.
VIII.
BENARES.

Balam Bhatta
middle of 17th Century.



EXPLANATION OF THE TABLES OF SUCCESSION IN THE DIFFERENT SCHOOLS.

The line joining *P, A, B, C* .... *a, b, c* .... is the *trunk* line.

The *horizontal* lines represent *agnate* kinsmen.

The *slanting* lines represent *cognate* kinsmen.

P represents the deceased owner.

a, b, c .... deceased owner's son, grandson, &c.

A, B, C .... deceased owner's father, grandfather, &c.

o represents a *female heir.*

d represents the daughter.

s or s_1 daughter's son.

s_2 son's daughter's son.

s_3 grandson's daughter's son.

$A—x_1$ represents *A's* son.

$B—x_1$ represents *B's* son.

$A—x_2$ represents *A's* grandson.

$B—x_2$ represents *B's* grandson.

y_1, y_2, y_3 represent x_3's son, grandson, great grandson.

A_o / $_oA$ } *A's* wife, or mother of *P.*

A_o / $_oB$ } *B's* wife, or grandmother of *P.*

P——$_o$: deceased owner's widow.

a_o : son's widow.

The *arrow heads* indicate the next heir.

d′, e′, f′ represent great grandson's son, his grandson, &c.

A_o | $_o$| indicates that *A* has two wives.

The *dotted lines* indicate a *break* in the continuity of succession.

If the $_o$ be on the *left* side of the trunk line, it denotes that the wife succeeds *first*, and the husband comes next after her.

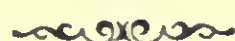
If the $_o$ be on the *right* side of the trunk line, it denotes that the wife succeeds *next after* the husband.

The tables read *Pa, Pb, Pc;* P_o, *Pd, Ps*: *A*, Ax_1, Ax_2, ... ; As_1, As_2, As_3, ... (in the ascending line); *B*, Bx_1, Bx_2 .... ; Bs_1 Bs_2, ... and so on upwards.

The above to be the order of succession generally, unless otherwise stated by a note in the margin or indicated by arrows.

LECTURE XI.

THE SUCCESSION OF AN ADOPTED SON.



Changes in mediæval law — Twelve classes of sons. Mitakshara on their rights — Apararka: the adopted son recognized as substitute for the son of the body in the Kali age — *Smriti Chandrika* — Appointment of a daughter to raise up a son prohibited — Dattaka Chandrika — Madhava — Visvesvara Bhatta — Vivada Chintamani — Dayabhaga — Dattaka Mimansa — Nirnaya Sindhu — Dharma Sindhu — Colebrooke's Digest — Practice of affiliating subsidiary sons (except the adopted) has become obsolete, though countenanced by the leading authorities — Affiliation of daughters not in vogue — Authorities on questions of adoption — Rights of subsidiary sons discussed by authors to show the nature of the practice of affiliation in ancient times — The practice, if existent anywhere in the present time, viewed in the light of special custom — Privy Council's *quære* as to the rights of an appointed daughter's son answered in the negative — Mitra Misra on the rights of subsidiary sons — Legitimate sons of the body and sons given are the only descriptions of sons recognized in modern times — "Sons given" includes kritrima son, or "son made" — *Kritrima* adoption valid in the districts governed by *Dattaka Mimansa* and *Vyavahara Madhava* — *Kritrima* adoption chiefly prevalent in *Mithila;* also occasionally practised in Behar and Benares — Form of *kritrima* adoption — Non-observances of religious ceremonies — Status of the *kritrima* son — Wife's son by an appointed brother or kinsman not recognized — Wife's son — Son of a remarried woman — Sons bought — Practice of admitting pupils on payment of price as prevalent among the ascetics is not adoption by purchase -- Adoption in two forms only legalized, *dattaka* and *kritrima* — *Dwyamushyayana*, or son of two fathers; his status in two families — Validity of the adoption of an only son as *dwyamushyayana* — Law regarding *dwyamushyayana* form of adoption practically unimportant — This kind of adoption is a branch of the dattaka form — Adopted son stands in the place of a son born — His rights when a legitimate son is afterwards born. "One-fourth share" — Different interpretations of the phrase — Interpretation by the Bengal Courts: one-fourth of the entire estate of the late owner — Questioned by the Madras and Bombay Courts — Their interpretation: one-fourth of the share of the legitimate son, *i.e.*, one-fifth of the entire estate — Nanda Pandita's view: one-fourth of what he (the adopted son) would be entitled to were he a legitimate son — In the Bengal School his share one-third of the entire estate — His share as recognized by different schools concisely shown in algebraic symbols — He is an heir of the sapinda kinsmen of his adoptive father —

Lecture XI.

Position of the dattaka son in the classification of sons by ancient law-givers — His right of succession both lineally and collaterally — His right of collateral succession settled by decided cases — *Tara Mohun* v. *Kripamayi* — *Padmakumari* v. *Jagatkishore* — *Uma Sankar Maitra* v. *Kalikamal Mazumdar*.

Changes in mediæval law.

We are now in a position to take up again the thread of development which we dropped in a previous lecture. The tangled skein is, we admit, difficult to unravel; but once unfolded, it will serve as a clue to guide us in the labyrinth of Hindu law. Let us now note with care the important changes which the modern legislators have introduced into mediæval law, and patiently observe the action and reaction of foreign juridical ideas upon the indigenous law of the country.

Twelve classes of sons. Mitakshara on their rights.

First, as regards the twelve classes of sons, the Mitakshara says:—"All, without exception, have a right of inheriting their father's estate for want of a preferable son." [1]

Apararka: the adopted son recognized as substitute for the son of the body in the Kali age.

Apararka:—"Of the different substitutes of sons, the adopted (dattaka) son alone is recognized in this (Kali) age. For, referring to the laws abrogated in the *Kali* age, Saunaka says:—'The different classes of sons other than the begotten (aurasa) and the adopted (dattaka) are not recognized in this age.'" [2]

Smriti Chandrika.

Smriti Chandrika:—"The secondary sons thus enumerated had all been recognized as sons in former ages; but, in the *Kali* age, the adopted son alone is

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[1] I, 11, 33. [2] Ch. In., 359.

acknowledged. By the text 'None is to be taken as a son except a son of the body or one who is adopted,' the learned have, in the early period of the Kali age, prohibited the recognition of any son other than the legitimate and the adopted, with the view of maintaining virtue in the world.

LECTURE XI.

Appointment of a daughter to raise up a son prohibited.

"The appointment of a daughter to raise up a son to her father must also be considered by the same text to be prohibited in the *Kali* age, such a son not being either of the body or adopted. The conclusion hence is, that, in the *Kali* age, in default of a legitimate son or grandson, the adopted son alone, and none else, is recognized as a subsidiary son." [1]

Dattaka Chandrika.

The same author of the Smriti Chandrika says again in Dattaka Chandrika:—

"Of these (subsidiary sons), however, in the present age, all are not recognized. For a text (of Vrihaspati) recites,—'Sons of many descriptions, who were made so by ancient saints, cannot now be adopted by men, by reason of their deficiency of power;' and against any others than the son given being substitutes, there is a prohibition in a passage of law, wherein—after having been premised, 'The adoption as sons of any other than the legitimate son, and son given'—it is subjoined, 'These rules sages pronounce to be avoided in the *Kali* age.'" [2]

Madhava.

Madhava:—"The texts which go to prove that the other substituted sons besides the *datta* share in the

[1] X, 5, 6. [2] I, 9.

LECTURE XI.

inheritance, refer to some other age of the world, because it is prohibited in another Smriti to receive them as sons in the *Kali* age :—' The receiving of others than the *datta* and *aurasa* as sons, the begetting of offspring by a brother-in-law, and retiring to the forest,—all these practices, the wise have said, should be avoided in the Kali age.' "[1]

Visvesvara Bhatta.

Visvesvara Bhatta, commenting on the passage of the Mitakshara relating to the different classes of sons, remarks :—

" All this refers to a former age. In *Kali* the son of the body and the adopted son alone are recognized; the appointed daughter also (is recognized), for she is equal to a son of the body. For the text says,—' No sons other than the begotten and the adopted are recognized.' The disquisition (in the Mitakshara) should have ended with the following words: ' The wise have declared that these laws are abrogated in the *Kali* age.' It will also be noticed that custom has, in this respect, widely deviated from the rules laid down by the ancient sages. *All* the laws of Manu are not in force in the Kali age."

Vivada Chintamani.

Vivada Chintamani :—" Among these, the first six are kinsmen and heirs ; the other six inherit only from their own fathers.

" All these adopted sons are pronounced heirs of a man who has no son begotten by himself.

" Manu and other legislators have aid that,

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[1] Burnell's Translation, p. 24.

notwithstanding other kinds of sons, the legitimate son alone receives the whole estate of his father; but they have also declared that the other sons are sharers of the estate. To remove this contradiction it must be understood that, if the legitimate son be virtuous, he shall receive the whole estate without giving a share to the others; but if he be void of good qualities, and others possess them, they are entitled to have their respective shares, as has been stated above."[1]

LECTURE XI.

Daya-bhaga.

Dayabhaga:—"The true legitimate son and the rest to the number of six are not only heirs of their father, but also heirs of kinsmen,—that is, of sapindas and other relations. The others are successors of their (adoptive) father, but not heirs of collateral relations (sapindas, &c.)

"They take the whole estate of a father who has no legitimate issue by himself begotten; but if there be a true son, such of them as are of the same tribe with the father take a third part.

"Since the appointed daughter is equal to the legitimate son, the same order of distribution must be observed in her case."[2]

Dattaka Mimansa.

Dattaka Mimansa of Nanda Pandita:—"'Sons of many descriptions who were made so by ancient saints cannot now be adopted by men, by reason of their deficiency of power, &c.' On account of this text of Vrihaspati, and because, in this passage,

[1] Page 287.

[2] X, 8—10.

LECTURE XI.

('There is no adoption as sons of any other than the son given and legitimate son, &c.') other sons are forbidden by Saunaka in the *Kali* or present age; amongst the sons, however (who have been mentioned), the son given and the legitimate son only are admitted."[1]

Nirnaya Sindhu.

Nirnaya Sindhu of Kamalakara: — "Although Yajnavalkya enumerates twelve classes of sons, and one of his texts declares that, 'among these, the next in order is heir, and presents funeral oblations, and takes the paternal estate on failure of the preceding,' it must still be understood that this text refers only to the legitimate son of the body and the adopted (dattaka) son; for, according to Aditya Purana quoted in Hemadri, all other classes of sons are prohibited in the Kali age."[2]

Vyavahara Mayukha.

Vyavahara Mayukha of Nilakantha:—"Here we must remark, that, with the exception of the given son, (all the other ten) secondary sons are set aside in the *Kali* or present age, for we read in the prohibitions of it: 'The acceptance, likewise, of affiliations other than those of a legitimate and adopted son, &c.'"[3]

Dharma Sindhu.

The *Dharma Sindhu of Kasi Natha*, a treatise on ritual universally followed in the Benares school, in speaking of persons *competent* to perform the obsequies of a deceased individual, says:—

"On failure of the legitimate son of the body, other

[1] I, 64. [2] Page. 313. [3] Chap. IV, 4, 46.

classes of sons, such as the son of an appointed daughter, the son of wife, &c., were formerly mentioned (as persons entitled to perform the ceremony). But inasmuch as these substitutes for sons are not recognized in this age, the adopted son (dattaka) alone is entitled, in default of the legitimate son of the body, to perform the exequial ceremonies." [1]

LECTURE XI.

Colebrooke's Digest.

I will conclude these extracts by giving one more from the Vivada Bhangarnava of Jagannatha, better known as Colebrooke's Digest of Hindu Law:

"Among the twelve descriptions of sons, begotten in lawful wedlock, and the rest, any others but the son of the body and the son given are forbidden in the *Kali* age. Thus the Aditya Purana, premising 'the filiation of any but a son lawfully begotten or given in adoption by *his parents*,' proceeds: These parts of ancient law were abrogated by ancient legislators, as the case arose at the beginning of the Kali age, with an intent of securing mankind from evil. The meaning is, mankind would be culpable if the practice of raising up a son on the wife of a kinsman and so forth were *now* followed. . . In like manner, sufficient reasons may be assigned for the prohibition of appointing a daughter and so forth.

"Among these twelve descriptions of sons, we must *only* now admit the rules concerning a son given in

[1] Bombay edition, III, p. 4.

LECTURE XI.

adoption and one legally begotten. The law concerning the rest has been inserted to complete that part of the book, as well as for the use of those who, not having seen such *prohibitory* texts, admit the filiation of other sons. Thus, in the country of Odra (Orissa), it is still the practice with some people to raise up issue on the wife of a brother."[1]

Practice of affiliating subsidiary sons, except the adopted, has become obsolete.

This catena of texts will prove to you that the practice of affiliating different kinds of sons has become obsolete at the present day. The only exception is the dattaka, or the son given by his parents.

It may be said that the Mitakshara, the Dayabhaga, and the Vivada Chantamani—the leading authorities in the Benares, the Bengal, and the Mithila Schools—*seem* still to countenance the practice. That these schools do not recognize such a custom is proved beyond question by the other text-writers of these schools, who have followed the lead of Vijnanesvara, Jimutavahana, and Vachaspati Misra. The authority of Visvesvara Bhatta, Madhava, Kamalakara, Nanda Pandita, and Jagannatha is quite enough to show that the ancient practice of affiliating different kinds of sons has fallen into desuetude in this age.

Though countenanced by the leading authorities,

affiliation of daughters not in vogue.

The dictum of Jagannatha of the Bengal School establishes beyond question the fact that the practice of affiliating daughters in default of male issue, and

[1] Colebrooke's Digest, II, p. 416.

the other forms of adoption enumerated by Manu, has become *wholly* obsolete in the present age.

LECTURE XI.

The same may be said also of the Benares School. Visvesvara Bhatta, Madhava, Nirnaya Sindhu, and Dharma Sindhu give plain and unequivocal answers on this point—"the practice is forbidden in the present age."

Authorities in matters regarding adoption.

The authority of Visvesvara Bhatta is highly respected in the Mithila School. The words of Madhava and Kamalakara carry universal weight. The Dattaka Mimansa and the Dattaka Chandrika, the two standard treatises on adoption, are the reigning authorities in *all* the schools; and we have seen that both of them strongly denounce the practice.

If you compare the opinion of Devananda Bhatta in the Dattaka Chandrika with his words in the Smriti Chandrika, you will find that he emphatically maintains that the learned in the early period of the Kali age prohibited the recognition of any other son than the legitimate and the adopted, "with the view of maintaining virtue in the world."

The Smriti Chandrika and the Vyavahara Mayukha have forbidden the practice in the Dravira and the Maharastra Schools.

It is plain, therefore, that the adopted son is the only secondary son recognized in the present age.

Rights of subsidiary sons discussed by authors to

It may reasonably be asked, however, "how is it, if the practice of affiliating secondary sons be obsolete in the present age, that Vijnanesvara, Vachaspati

LECTURE XI.

show the nature of the practice of affiliations in ancient times.

Misra, and Jimutavahana devote such a large space in their treatises in discussing the rights of subsidiary sons ?"

The question may be answered in the words of Jagannatha: "They did so to complete that part of the book." They did so simply to show the nature of the practice as it existed in *former ages*. They merely gave a historical review of the subject, and did *not* enjoin the practice in the present age. The fact is, the practice was still lingering in some parts of the country when the authors of the Mitakshara, Chintamani, and the Dayabhaga promulgated their laws. The discussion of the rights of secondary sons, then was, in the language of Jagannatha, for the benefit of those who "not having seen the prohibitory texts still admitted the filiation of the subsidiary sons." We can by no means admit that the practice *universally* prevailed at the time of Vijnanesvara, Vachaspati Misra, and Jimutavahana. It was strongly denounced by Vrihaspati and others. But it is not improbable that the custom was at its last gasp at the time of Vijnanesvara. Apararka, Devananda, and Madhava, coming after the author of the Mitakshara, abolished it altogether. The custom might have partly revived in some parts of India at the time of Vachaspati Misra and Jimutavahana, and that might have been partly the reason of their discussing the nature of the custom in their works. Apart from the question whether such a practice *pre-*

vailed at the time of Vijnanesvara, Vachaspati Misra, and Jimutavahana, there is not the shadow of a doubt that the practice is *obsolete* at the present day. Our authority for making this statement is the opinion of Devananda, Kamalakara, Nanda Pandita, Nilakantha, and Jagannatha. The last four authors are the most recent authorities on the subject, and their evidence as to the non-existence of the custom at the present day cannot be questioned. Their words authoritatively settle the point that the custom has been entirely abrogated in the present age.

The practice, if existent anywhere in the present time, viewed in the light of special custom.

If the custom be found to exist in any family, caste, or tribe, it must be viewed as a special usage, and the law relating to *special usage* must be applied to it. The Privy Council, in the case of *Rama Lakshmi Ammal* v. *Sivanantha Perumal Sethurayer*, justly remark, that "their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."[1]

[1] Beng. Law Rep., Vol. XII, p. 398.

LECTURE XI.

Privy Council's *quære* as to the rights of an appointed daughter's son.

It would have been quite unnecessary to enter so fully into this subject again had it not been for the *query* which the Privy Council put in the well-known case of *Thakur Jibnath Sing* v. *The Court of Wards*. "Is the old rule of Hindu law obsolete, or does it still exist, that a daughter may be specially appointed to raise a son, and the son of a daughter so appointed is entitled to succeed in preference to more distant male relatives? There certainly does not appear to have arisen in modern times any instance in the Courts where this custom has been considered. But supposing it to exist, inasmuch as it breaks in upon the general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it."[1]

Answered in the negative.

We have already given an answer to the *quære* put by the Privy Council. It is the unanimous opinion of the text-writers following in the footsteps of Vijnanesvara, Vachaspati Misra, and the author of the Dayabhaga, that the old rule of Hindu law, which laid down that a daughter might be specially appointed to raise a son, has been totally abrogated in the present age. Visvesvara Bhatta is the only text-writer who seems to feel a little hesitation in regard to this point. "The son of an appointed daughter," he says, "is equal to a legitimate son of the body. He also, therefore, is recognized in the present age." The custom might have been still lingering in the pre-

[1] 23 W. R., P. C., 409.

cincts of the Court of Madanapala, in Kashthanagara, on the banks of Jamuna, when Visvesvara wrote his treatises, but it was abolished in all other parts of the country. The authority of Devananda and Madhava is clear on this point. All the other text-writers confirm the view taken by them, and it, therefore, may be accepted as an undoubted fact that the *old rule* of appointing a daughter to raise a son has become *obsolete*.

LECTURE XI.

Mitra Misra on the rights of subsidiary sons.

We have not quoted the authority of the Vira-mitrodoya in this place. The author, Mitra Misra, in discussing the old rule, simply repeats the views of his predecessors. He is unable to give any decided opinion of his own. He bewilders himself in trying to reconcile the contradictory texts relating to this subject. The text of Vrihaspati and other sages, he says, are to be reconciled "*somehow or other*."[1] Here the great expounder of Vijnanesvara's law plainly declares his utter inability to arrive at any conclusion regarding the rights of the subsidiary sons. "Try to reconcile the texts yourselves," he tells his readers; "I am unable to do so." As he approaches the end of the disquisition, however, he appears to perceive a faint glimmer of light,—"They are to be reconciled with reference to special local customs."[2] He has in these words cut the gordian knot, and solved the difficulty. Any attempt at reconcilement of the contradictory texts is impossible. The rule was in

[1] II, 2, 18. [2] II, 2, 19.

LECTURE XI.

full force in ancient times. It lost its hold with the advance of civilization, and is utterly inapplicable to the present circumstances of the country. If the custom is found in special localities, then the *old* law may be applied; but to say that the old rule is still universally recognized, would be utterly unfounded. This is what Mitra Misra must have meant by saying that the contractory texts must be reconciled " with reference to local customs."

Legitimate sons of the body and sons given are the only description of sons recognized in modern times.

I said that the only descriptions of sons which the text-writers recognized in the present age are the legitimate sons of the body and the son given. This statement requires a little explanation.

'Son given' includes kritrima son, or 'son made.'

The term 'given' is said to be a general term, and comprehends also 'a son made.' Nanda Pandita, in his Dattaka Mimansa, says, " The term *given* is inclusive also of the sons made."[1] This statement is made on the authority of Parasara, who, in treating of the law of the *Kali* age, recognizes the *kritrima*, or son made, as a subsidiary son.

Kritrima adoption valid in the districts governed by *Dattaka Mimansa* and *Vyavahara Madhava.*

This view of Nanda Pandita is supported by the authority of Vyavahara Madhava, " The mention of a *datrima* son is to include kritrimas."[2] We see then that both Madhava and Nanda Pandita have excepted the dattaka and the *kritrima* modes of adoption from the sweeping prohibition against the affiliation of all other classes of subsidiary sons.

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[1] I, 65.

[2] Burnell's Translation, p. 24.

It would follow, therefore, that the *kritrima* form of adoption would be held valid in all those districts which are governed by the Dattaka Mimansa and Vyavahara Madhava.

LECTURE XI.

"The adoption of a kritrima son," says Mr. Sutherland, the learned translator of Dattaka Chandrika and Dattaka Mimansa, "is chiefly prevalent in the Mithila country, and is rarely practised in other parts of India. 'The practice,' says Mr. Colebrooke, 'of adopting sons given by their parents, was there abolished by Sridatta and Pratihasta, although the latter had been himself adopted in that manner. Their motive was, lest a child already registered in one family, being again registered in another, a confusion of families and names should thence ensue. A son adopted in this form does not lose his claim to his own family, nor assume the surname of his adoptive father: he merely performs obsequies and takes the inheritance.'"

Kritrima adoption chiefly prevalent in *Mithila.*

Mr. Sutherland was informed that Sridatta and Pratihasta had not abolished the practice noticed in their written works. "A case of the nature alluded to had occurred: in consequence a general assembly of Brahmins was held, at which the celebrated Pandits mentioned had presided, and it was there agreed that, for the future, the practice of the *dattaka* adoption should be discontinued. But though this mode does not, accordingly, now prevail in the Mithila country, unforbidden as it is by Vachaspati Misra

LECTURE XI.

and the best writers there current, it is not to be inferred that if, in any case preferred, such mode of affiliation would be illegal."[1]

Also occasionally practised in Behar and Benares.

The *kritrima* form of adoption is certainly most common in Mithila. But it should be remembered that it is not exclusively confined to that district. This form of adoption is occasionally practised in Behar, Benares, and other places.[2] Should it, therefore, be found that in a given case the *kritrima* form is followed in preference to the dattaka in districts governed by the Dattaka Mimansa and Vyavahara Madhava, such adoption will not be held invalid "unless, indeed, it appeared such mode were expressly prohibited by works on law of paramount local authority."[3] In matters of adoption Nanda Pandita's work must be held to be of superior authority to the Nirnaya Sindhu and the Dharma Sindhu, and must, therefore, authoritatively settle the point, that the *kritrima* form of adoption is valid in the Benares School.

Form of *kritrima* adoption.

The prescribed form for adopting a *kritrima* son is thus described by Rudradhara in his Sudhi Viveka: "In an auspicious hour let him bathe, and also cause the person whom he wishes to adopt to be bathed; let him present something at his pleasure, and say, 'Be

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[1] Sutherland's Synopsis, note, 15.

[2] Srinath Sarma *v.* Radhakant, Sudder Dewany Adawlut, Vol. I, 1796, note, p. 15.

[3] Sutherland's Synopsis, II, note, 10.

thou my son,' and let the son answer, 'I am become your son.' Then let him, according to custom, give a suit of clothes to the son. These are the legal conditions of the *kritrima* adoption. The giving of some chattel to the *kritrima* son arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite, and a set form of speech is not essential."[1]

LECTURE XI.

Non-observance of religious ceremonies.

We see then that the *kritrima* form of adoption, as practised in Mithila, is completed by the simple declaration and consent of the parties, without any religious ceremonies.

Status of the *kritrima* son.

As regards the *kritrima* form of adoption, "in its inception and consequences," it is, in the language of the Privy Council, "very distinguishable from one in which the natural father parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the *kritrima* form retains his rights of inheritance in his original and natural family."[2]

Wife's son by an appointed brother or kinsman not recognized.

Jagannatha said that "in the country of Udra (Orissa), it is still the practice with *some* people to raise up issue on the wife of a brother."[3] Colebrooke

[1] M. Sutputtee *v.* Indranund Jha, Select Reports, Sudder Dewany Adawlut, Vol. III, p. 307.

[2] Wooma Daee *v.* Gokoolanund Dass, Ind. Law Rep., 3 Calc. Series, P. C., 587. As to the nature and extent of the heritable rights of the *kritrima* son, *see* 7 W. R., 500; 8 W. R., 155; 25 W. R., 255.

[3] Colebrooke's Digest, Vol. II, p. 417.

LECTURE XI.

repeated this statement, and remarked, that "the practice of appointing brothers to raise up male issue to deceased, impotent, or even absent husbands, prevails in Orissa."[1] We have not found a single reported case confirming this statement. From all the inquiries we have made on the subject, it appears that the practice is highly reprobated among the higher classes in Orissa, and if it exists among the lower classes at all, it exists in such a form that practically it is of no importance whatever from a juridical point of view.[2] If a case should ever occur in

Wife's son.

which the rights of a *khetraja*, or wife's son, are to be determined, it must be proved that the practice according to which such rights are claimed has existed as a custom in the family from time immemorial. The practice of appointing brothers to raise up male issue (*niyoga*) has been abrogated in the *Kali* age,[3] and cannot be justified by any rule of Hindu law. Jagannatha distinctly says, that "mankind would perish if the practice of raising up a son on the wife of a kinsman and so forth were *now* followed."

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[1] Colebrooke's Digest, Vol. II, p. 409.

[2] Widow marriage does not prevail in Orissa among the Brahmanas, Mahantis (Kayasthas-karanas), and Putuli Banias; but it prevails among other classes. Marriage with an elder brother's widow is considered to be a very honorable alliance among the Khandayits and Gauras (Gowalas). Many rich and noble families in Orissa are of the Khandayit caste. Though the practice of *niyoga*, strictly so-called, is obsolete among them, it has probably assumed the modernized form of "marriage with an elder brother's widow."

[3] Dattaka Mimansa, I, 66.

Custom, however, legalizes any practice whatever; but it should always be remembered that "to establish a family custom at variance with the ordinary law of inheritance, it is necessary to show that the usage is ancient and has been invariable, and it should be established by clear and positive proof."[1]

LECTURE XI.

Son of a remarried woman.

A case is reported of a son of a twice-married woman (*paunarbhava*) claiming the estate of his father. The question to be decided was, whether the law of the country recognized the title of such a son to inheritance. The old rule of Hindu law, recognizing such a son, is abrogated in the *Kali* age; the law of the country, therefore, would *not* favor the pretensions of such a son. The point *then* to be considered was, whether invariable and immemorial *custom* would sanction the alleged title to inheritance of the son of a twice-married woman. The question asked was— "Is it *customary* for sons of that description to succeed?" It was *held*, that subsidiary sons of that description are entitled to inheritance, where the *lex loci* would justify such an affiliation.[2]

Sons bought.

The *krita*, or sons bought, come also under the same general prohibition. "In former days, before the present *Kali Yuga*, there were twelve descriptions of sons," says the High Court, in the case of *Eshan Kishore Acharjee Chowdhry* v. *Haris Chandra Chowdhry*, "and the eighth description, we find in the

[1] Raja Nagendranarain *v.* Raghunath Narain Dey, W. R., Sp. No., p. 20.
[2] Sudder Dewany Adawlut Report, Vol. I, p. 28.

LECTURE XI.

Hindu law, was the son adopted after payment of price. Such an adoption,—namely, after payment of price,—is not recognized in the present *yuga*, or *Kali yuga*, the only adoption now recognized being that of the *dattaka* son, or son given, who alone can take the place of the *aurasa* son, or son of the loins."[1] The remarks of Colebrooke on this point are far too pertinent to be omitted: "On this side of India adoption by purchase is obsolete, and considered to have been prohibited in the present sinful age of the world; the only practice analogous to it is the purchase of children by *goswamis* or gosains, *sanyasis*, and other professed ascetics, for initiation into their order of devotion, the disciple becoming the heir of the master. This, however, is not adoption, but a practice grounded on other provisions of the Hindu law, and on the peculiar customs of the mendicant tribes."[2]

Practice of admitting pupils on payment of price as prevalent among the ascetics is not adoption by purchase.

Adoption by purchase has been said to be prevalent among *sanyasis*. This is not strictly correct. Whenever the professed ascetics receive any *chelas*, or disciples, whom they nominate as heirs, they pay a *nominal* price, it is true, but it would be wrong to call it adoption by purchase. The essential conditions of a purchase are wanting in such a transaction. The payment of a nominal price is not with the object of bargain and sale, but is merely intended to be an evidence of a sort of symbolical transfer

[1] Bengal Law Rep., Vol. XIII, p. 42.

[2] Strange's Elements of Hindu Law, Vol. II, p. 133.

from the legal guardians of the boy to his spiritual preceptor, who makes him his disciple to initiate him into the mysteries of his craft and acknowledges him as his heir. The *nominal* price spoken of is not paid to the natural father or any other guardian of the adopted son, but is generally spent in charity. The price need not be in the form of a piece of gold; it is symbolical in every respect, and may be even a handful of rice. LECTURE XI.

It will be quite apparent from all that we have said above, that affiliation in every form, except the *dattaka*, has been abrogated in the present age; and that the *kritrima* mode of adoption prevalent in Mithila, and found occasionally in Behar, Benares, and other places, is merely a relic of an ancient institution. We need not enter into the question, whether, out of Mithila, or wherever else the *kritrima* mode of adoption customarily prevails, such mode would be upheld as legally valid. That point we must reserve for future inquirers. It is beyond our province to enter into details regarding the different forms of adoption. Adoption in only two forms legalized, *dattaka* and *kritrima.*

There is a variety of the *dattaka* son to whom the name of *dwyamushyayana* has been applied. *Dwyamushyayna* means the son of two fathers. The term is applicable to an adopted son (*dattaka*) retaining his filial relation to his natural father with his acquired relation to his adoptive parent. Where a mutual agreement between the natural father and *Dwyamushyayana*, or son of two fathers.

LECTURE XI.

the adopter exists, to the effect that the adopted should be the son of the natural father and the adopter likewise, the son so adopted is technically called a *dwyamushyayana*.[1]

Speaking of this variety of the *dattaka* son, the *Dattaka Mimansa* says :—These sons of two fathers are of two descriptions : "Those absolutely sons of two fathers, and those incompletely so. Of these, those are named 'absolute dwyamushyayanas' who are given in adoption with this stipulation, 'this is the son of us two (the natural father and the adopter).' The incomplete *dwyamushyayanas* are those who are initiated by their natural father in ceremonies ending with that of tonsure, and by the adoptive father, in those commencing with the investiture of the characteristic thread; since they are initiated under the family names of both, even they are the sons of two fathers, but incompletely so. Should a child directly on being born be adopted, as his initiation under both family names would be wanting, he would partake only of the family of the adopter."[2]

The adopted son, says Sutherland, "may retain filial relation to his natural father, in which case he is called a *dwyamushyayana*, or son of two fathers. This double filial relation proceeds from a special agreement between the adoptive and natural father at the time of adoption, or may exist without such

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[1] Dattaka Chandrika, II, 24, 40.

[2] Dattaka Mimansa, VI, 41.

agreement, as mostly, if not always, in the case of the kritrima adopted son who is not alienated by his natural father. In the first case, such son is denominated a complete (*nitya*); in the second, an incomplete (*anitya*) *dwyamushyayana*.

His status in two families.

The adopted son, who is son of two fathers, inherits the estate and performs the obsequies of both fathers; but the relation of his issue (except in the case of the *kritrima* son, as usually affiliated in the Mithila country) obtains exclusively to the family of the adoptive father."[1]

Validity of the adoption of an only son as *dwyamushyayana*.

It was ruled in the case of *Raja Shumshere Mul* v. *Ranee Dilraj Koer*,[2] that the adoption of an only son is invalid under the Hindu law, unless the natural father deliver the son to the adoptive father on condition that he shall belong to both as a son, and the latter accept and adopt him as such: in this case the adoption is good, and the adopted son is denominated *dwyamushyayana*, or son of two fathers.

In the case of *Joymony Dossee* v. *Sibosoondry Dossee*, the Calcutta Supreme Court laid it down, that "the adoption of an only son is, no doubt, blamable by Hindu law, but when done it is valid. Parties having two modes of doing the same thing, the Court will not suppose that the party has adopted that one which is immoral and blamable. The agreement between the adoptive and natural father may be for

[1] Sutherland's Synopsis of Hindu Law, Head V.

[2] Select Reports, Sudder Dewany Adawlut, 1816, Vol. II, p. 216.

LECTURE XI. him to become a *dwyamushyayana*, or son to both fathers."[1]

While on this subject, I may direct your attention in passing to the case of *Upendralal Roy* v. *Rani Prasannamayi*, where it was held, that "the adoption of an only son is invalid according to Hindu law."[2] In the course of the arguments upon which the decision is based, the learned Judge (Mr. Justice D. Mitter) remarked: "Now, the perpetuation of lineage is the chief object of adoption under the Hindu law; and if the adoptive father incurs the offence of 'extinction of lineage' by adopting a child who is the only son of his father, the object of the adoption necessarily fails. It is true that the doctrine of *factum valet* is, to a certain extent, recognized by the lawyers of the Bengal school; but if we were to extend the application of this doctrine to the law of adoption, every adoption, when it has once taken place, will be, as a matter of course, good and valid, however grossly the injunctions of the Hindu *shastras* might have been violated by the parties concerned in it."

It is the settled law then in the Bengal School that the adoption of an only son is forbidden by the Hindu law.[3] But the adoption of an only son, says the Allahabad High Court, cannot be declared invalid after it has once taken place.[4] But we say with the

[1] Fulton's Reports, p. 75. [2] Bengal Law Rep., Vol. I, p. 221.
[3] Manick Chunder Dutt *v.* Bhuggobutty Dassee, I. L. R., 3 Calc., 443.
[4] Hanuman Tewari *v.* Chirai, I. L. R., 2 All., 164.

Dattaka Chandrika, that "the prohibition—'let not a man give an only son'—refers to an adopted son other than the *dwyamushyayana*, or son of both fathers, for (where the adopted son is such) no extinction of lineage ensues, as has already been declared."[1]

LECTURE XI.

Law regarding *dwyamushyayana* form of adoption practically unimportant.

This is the present law regarding the *dwyamushyayana* form of dattaka adoption. "The effect by the Hindu law," says the Privy Council, of an adoption, *dwyamushyayana*, "is not to deprive the adopted son of his lineage to his natural father, or to bar him of his right of inheritance to his father's estate."[2] The law, however, does not appear to be of much practical importance at the present day. The adoptive father naturally wishes to cut off entirely the connection of the adopted son with his natural family, and with this object he performs all the mystical rites which have the effect of transferring the adopted son from his natural family to that of the adoptive father. The adopted son must identify himself entirely with his adoptive family. The adoptive father tries every means in his power by which the adopted son may be entirely alienated from his natural family. "The son of two fathers" is recognized by Hindu law, but in practice seldom exists. If it so happened that the adopted son belonged to the family of the adoptive father—if, for instance, he was the son of a brother, then the law regarding a *dwyamushyayana* may be called into operation, and all its consequences must be strictly adhered

[1] Dattaka Chandrika, III, 17. [2] 13 Moore's Ind. App., 85.

LECTURE XI.

to. But even in such a case there is a tendency to devise means to extinguish the double filial relation altogether. Be that as it may, it should be understood once for all that the *dwyamushyayana* form of adoption is not a relic of the past; the sweeping prohibition against the adoption of subsidiary sons other than the *dattaka* and the *kritrima* does not apply to this form of adoption. It is only a variety, as we said, of the *dattaka* form of adoption, and so long the *dattaka* form of adoption is recognized by Hindu law, 'the son of two fathers' will receive his rights, shall belong to both as a son, and shall succeed to the estate both of his adoptive and natural parents.[1]

This kind of adoption is a branch of the dattaka form.

Adopted son

It is beyond our province to enter at length into the subject of adoption. It is a very wide subject, and cannot be dismissed in a few words. We shall merely content ourselves by observing that an adopted son represents *in every respect* a son of the body born in lawful wedlock, and is entitled to all the rights and privileges of such a son. Adoption causes complete severance from the family of birth, and a *given* son must never claim the family and estate of his natural father.

Stands in the place of a son born.

An adopted son then has all the rights of a son born.[2] It appears abundantly clear from both Dattaka Chandrika and Dattaka Mimansa that the position and status of an adopted son are precisely the same as those of a natural born son, except in a few

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[1] As to his share, see Dattaka Chandrika, V. 33.

[2] 3 Weekly Reporter, p. 24.

instances, which are expressly enumerated.[1] "According to Hindu law," says the Calcutta High Court, "an adopted son occupies the same position, and has the same rights and privileges, in the family of the adopter as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption."[2]

LECTURE XI.

His right when a legitimate son is afterwards born: "One-fourth share."

The Dattaka Mimansa, in referring to the succession of an adopted son, remarks: "Vas'ishtha says, 'when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part.' On default of him, he is entitled to the whole."[3]

Different interpretations of the phrase.

This is the doctrine laid down in the Dattaka Mimansa, which is an infallible guide in matters of adoption in the Mithila and Benares Schools. The true meaning of the doctrine, however, is difficult to apprehend. Different interpretations have been given by the teachers of different schools on the words of Vas'ishtha. Vas'ishtha says, that *the given son shares a fourth part*. Teachers disagree as to the exact meaning of the words '*a fourth part*.' Is *the fourth part* of the entire estate meant, or is it a fourth of the share taken by the son of the body;—or is it "the fourth of what he would have taken as a legitimate son?" The founder of the Benares School says,—"The allotment of a quarter share to other

Interpretation by the Bengal Courts: one-fourth of the entire estate of the late owner.

[1] Padmakumari Debee *v.* Jagat Kishore Acharjee, I. L. R., 5 Calc., 615.
[2] Umasankar Maitra *v.* Kalikamal Mozumdar, I. L. R., 6 Calc., 257.
[3] Dattaka Mimansa, V. 40; X, 1.

LECTURE XI.

inferior sons when a superior one exists has been ordained by Vas'ishtha."[1] This would mean that the ratio of the shares between the legitimate son and the adopted son is as 3 : 1. If the adopted son gets x, the legitimate son gets $3x$. It may be doubted whether the words of the Mitakshara quoted above would exactly bear this meaning. But it is too late now to attempt to discover any other. The Courts in Bengal have repeatedly interpreted the words in this sense, and we are bound to accept their interpretation. The estate should be divided into four parts ; three of these parts are to be given to the legitimate son, and one part to the adopted son.[2] In Bengal this interpretation has been accepted and acted upon, and it would be sheer madness to attempt to disturb the long course of decisions. The dictum of the Bengal Courts, however, has been questioned by the Madras and the Bombay Courts. It has been ruled both in Madras and Bombay that *the fourth share* which the adopted son should receive is not the fourth share of the entire estate, but the fourth of the share taken by the legitimate son.[3] In Madras and Bombay then the estate would be divided into *five* parts ; four of these would go to the legitimate son, and the *fifth* share would belong to the adopted

Questioned by the Madras and Bombay Courts.

Their interpretation: one-fourth of the share of the legitimate son;

i.e., one-fifth of the entire estate.

[1] Mitakshara, I, 11, 24.

[2] Preeag Sing *v.* Ajoodya Sing, Select Reports, Sudder Dewany Adawlut, Vol. IV, p. 96.

[3] Ayyavu Muppanar *v.* Niladatchi Aumal, 1 Madras High Court Report, p. 45.

LECTURE XI.

son. In other words, if x be the share of the adopted son, $4x$ would be that of the son of the body.

Nanda Pandita's view: one-fourth of what he (the adopted son) would be entitled to were he a legitimate son.

Nanda Pandita, the author of the Dattaka Mimansa, would have us believe that the *fourth part* mentioned by Vas'ishtha is "a quarter share; not an entire share." These enigmatical words might be taken to mean that the adopted son, in competition with the legitimate son, should receive *the fourth of the share which would be allotted to him, supposing him to be a real legitimate son.*[1] According to Nanda Pandita, then, if it be necessary to find out the share of an adopted son, we must treat the latter as a legitimate son, and determine the share which he would receive as a son of the body. Divide the share thus determined into *four* parts; one of these parts belongs to the adopted son. Suppose there are three legitimate sons and one adopted son. Divide the estate at first into four equal parts. Then the *fourth part* of the estate would belong to the adopted son, had he been a legitimate son. The share that legally belongs to him, however, is in this case the *fourth part* of a fourth part; in other words, the adopted son is entitled to a sixteenth part of the entire estate.

In the Bengal School his share one-third of the entire estate.

The Bengal authorities are of opinion that—"In a partition made between legitimate and adopted sons, the legitimate son has two shares, and the adopted sons, who are of the same class with the father,

[1] Sutherland's Synopsis, note, 22.

LECTURE XI.

take one share."[1] In the Bengal School, the estate is divided into three parts; one of these parts belongs to the adopted son. The true share then of an adopted son, and of the adopted son of a natural son (both of whom stand exactly in the same position) is *half* that of a legitimate son.[2]

Among *Sudras*, according to the Dattaka Chandrika, the legitimate and adopted sons share *equally* the estate of the deceased proprietor.[3]

His share as recognized by different schools concisely shown in algebraic symbols.

If we sum up the results we obtain the following formulæ:—

Let x be the share of the adopted son, and the multiples of x the shares of the legitimate sons.

Among *Sudras*—

$$x + x = 1$$

Among the twice-born classes :—

In Bengal—

$$x + 2x = 1$$

In Benares—

$$x + 3x = 1$$

In Madras and Bombay—

$$x + 4x = 1$$

N. B.—In these equations *unity* represents the property of the deceased.

We have determined the proportion of shares which would belong to an adopted son, where a division of heritage may take place between an adopted son and

[1] Dayakrama Sangraha, VII, 23 ; Dayabhaga, X, 7, 13.

[2] See Dattaka Chandrika, V, 24, 25; Raghubanund Doss *v.* Sadhu Churn Doss, I. L. R., 4 Calc., 425.

[3] Dattaka Chandrika, V, 32.

several legitimate sons subsequently born. With these results before us, it would be easy to allot a share to the adopted son. All our calculations, however, are based upon the supposition that a legitimate and an adopted son exist *together*. If there be no legitimate son subsequently born, the adopted son of course gets the entire property.

He is an heir of the sapinda kinsmen of his adoptive father.

The adopted son inherits not only the property of his adopted father, but is also an heir to the sapinda kinsmen on the adoptive father's side. He is entitled to both lineal and collateral succession. Lineally he inherits, like the legitimate son, the property of all the paternal ancestors of the deceased. Collaterally also he takes, like the legitimate son, the estate of the agnate descendants of the ancestors of the deceased.

You will remember that the ancient legislators divided the subsidiary sons into *two* groups. "All, without exception," says the Mitakshara, "have a right of inheriting their father's estate for want of a preferable son."[1] But the first six have greater rights than the last six. "The first six may take the heritage of their father's *collateral* kinsmen (sapindas and samanodakas) if there be no nearer heir; but not so the last six."[2]

You will also remember that the ancient *rishis* disagreed as to the exact position which should be assigned to the *dattaka* son in these two groups. Some placed

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[1] Mitakshara, I, 11, 33. [2] *Ibid*, I, 11, 31.

LECTURE XI.

him in the first group, while others placed him in the second. We have seen that the doctrines promulgated by the ancient legislators with regard to the heritable rights of the adopted son, *varied* in the different historical periods of the Hindu Law of Inheritance.

Position of the dattaka son in the classification of sons by ancient law-givers.

The dattaka son occupied the following places in the different classifications adopted by the ancient law givers:—

Harita, 7.	Vas'ishtha, 8.	Vishnu, 8.
Yama, 9.	Sankha, 9.	Devala, 9.
Gautama, 3.	Manu, 3.	Vrihaspati, 3.
Baudhayana, 4.	Yajnavalkya, 7.	Katyayana, 3.
	Narada, 9.	

The Mitakshara adopts the order laid down by Manu. The Smriti Chandrika also follows Manu. But Jimutavahana, it has been thought, prefers the authority of Devala to that of Manu. The Hon'ble Justice R. Mitter has clearly pointed out that it would be simply absurd to infer from the wording of the Dayabhaga that Jimutavahana intended that the adopted son should be entirely excluded from collateral succession. I would refer you to the judgment itself, which we quote in another place, for the reasons adduced by Justice Mitter in support of his position.

His right of succession, both lineally and collaterally.

You will thus see that, according to the original text-writers, an adopted son is not only an heir of his adoptive father, but also of his lineal and collateral kinsmen. In other words, the adopted son succeeds,

in the family of the adoptive father, to the agnate *sapindas* of the adoptive father.[1]

LECTURE XI.

His right of collateral succession settled by decided cases.

In the case of *Sumbhu Chunder* v. *Naraini Debia*, the point was settled, that an adopted son succeeds, not only lineally but also collaterally, to the inheritance of his adoptive father's relations. It has been held in a recent case, that an adopted son is not precluded from inheriting the estate of one related lineally, although at a distance of more than three generations from the common ancestor.[2]

Tara Mohun v. Kripamayi.

In the case of *Tara Mohun Bhuttacharjee* v. *Kripamayi Debia*, the question was, whether an adopted son was entitled to share in the property of one who was first cousin to his grandfather by adoption. The Court, in holding that the right of inheritance accrued to him, laid down authoritatively that "an adopted son represents his adoptive father, and is entitled to his share, and takes the same shares with heirs other than the legitimately begotten sons of his adoptive father."[3]

Padmakumari v. Jagatkishore.

In *Padmakumari* v. *Jagatkishore and Gogan Chundra*, the question was, whether an adopted son would be entitled to inherit the property of his adoptive

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[1] Sumbhoo Chunder Chowdhry v. Naraini Debia, Sutherland's Privy Council Rulings, Vol. I, p. 25 ; Kishen Nath Roy v. Hurree Govind Roy' Sudder Dewany Adawlut, 1859, p. 18 ; Loke Nath Roy v. Shama Soonduri, Sudder Dewany Adawlut, 1858, p. 163 ; Gooroo Persad Bose v. Rash Behari Bose, Sudder Dewany Adawlut, 1860, p. 411.

[2] See Mokundo Lal Roy v. Bykunt Nath Roy, I. L. R., 6 Calc., 290. See also Gourhurree Kubra v. Mt. Rutnasuree Debia, 6 Sel. Rep., 250.

[3] 9 Weekly Reporter, p. 423. See also Dino Nath Mukerjee v. Gopal Churn, 8 C. L. R., 57.

LECTURE XI.

father's daughter's son. It has been held, that an adopted son is the rightful heir of his adoptive sister's son. The question has been elaborately argued by the Hon'ble Justice R. Mitter. In this case the question to be settled was, whether an adopted son could succeed to a cognate sprung from the same family. The arguments are too nice and discriminating to be summarily disposed of. I would, therefore, recommend you to read this judgment,[1] which exhaustively

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[1] The lower Court decided that Gogun, the defendant in this case, could not, as an adopted son, succeed to the property of his adoptive sister's son. Justice Mitter says:—

"The lower Court has decided this question in favor of the plaintiffs, solely on the authority of a gloss on a text of Manu by Kalluka Bhatta, the well-known commentator of the Institutes of Manu. The text of Manu and the gloss in question are to be found at pages 145 and 146 of Colebrooke's Digest, Vol. III, Book V, Chap. IV, Sec. I. Whether this gloss supports the conclusion of the lower Court, is a question to which I shall revert hereafter. But it is beyond all doubt that it would not be a correct basis of decision, if the position laid down in it be found to be opposed to the authorities that are generally appealed to and govern the decision of questions of adoption arising in the Bengal School. These are the two well-known works on adoption, *viz.*, the Dattaka Chandrika by Devendra Bhatta and the Dattaka Mimansa by Nanda Pandita. Then, how does the question raised before us stand upon the authority of those two works of adoption? It appears abundantly clear from both these treatises, that the position and status of an adopted son are precisely the same as those of a natural-born son, except in a few instances which are expressly enumerated. In Sec. III, para. 1 of the Dattaka Chandrika, the author, after laying down a special rule, *viz.*, that 'an adopted son cannot officiate in the sixteen funeral repasts, if the legitimate son exists,' says: 'And a text of Yajnavalkya recites, "Amongst these the next in order is heir, and presents funeral oblations on failure of the preceding; otherwise the adopted son, in every respect, resembles the real legitimate one."' The same author, in discussing the question, whether an adopted son succeeds to empire or not, says in Sec. V, para. 28, 'Thus the son of the wife, the son given, and the rest, receive the share prescribed for them by the general law, for grounds

deals with many vexed questions regarding the law of adoption. Mr. Justice Mitter is of opinion that LECTURE XI.

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for contracting the operation of the same are wanting,' &c. Again, in Sec. VI, para. 53 of the Dattaka Mimansa, it is laid down:—'The adopted son, as substitute for the real legitimate son, being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the manes in honor of whom a legitimate son performs such repasts. For, without difference, relation to the father and other sires of the adopter obtains in the same manner as relation to the general family, the *sakha*, the family deity, and family rules, of that person.' From these passages it is evident that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural-born son.

"Have any text been produced to show that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family? The learned advocates who argued this question before us in support of the plaintiffs' contention, have not been able to refer us to any authority to establish this proposition.

"On the other hand, both in the Dattaka Chandrika and the Dattaka Mimansa, there are passages which lead to the opposite conclusion. The author of the Dattaka Chandrika, after referring to the contradictory texts of ancient *rishies* upon the subject of the adopted son being heir to his father's kinsmen, in Sec. V, para. 22, says:—' By reason of succeeding to the estate of sapinda kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen.'

"Then, after reconciling in the same paragraph these contradictory passages in a way which it is not necessary here to notice, in para. 24 he lays down the law thus:—'Therefore, by the same relationship of brother, and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or *other kinsmen*, where such son may not exist, (the adopted son) takes the whole estate even'

"Now, reading the two passages together, it is clear that the phrase 'other kinsmen,' italicised above, at least includes the sapinda kinsmen, if not others. Therefore, we have next to consider the question whether the defendant No. 2, Gogun, is a sapinda kinsman of Bhowany Kishore or not. The following passages from the Dattaka Chandrika and the Dattaka Mimansa will show that, as regards sapinda relationship in the family of the adoptive father, there is no difference between a dattaka and a natural-born son (para. 32, Sec. VI, Dattaka Mimansa): 'Therefore, not being otherwise inferrible, the relation of sapinda in the peculiar family (kula) of the adopter, as founded only on express text of

LECTURE XI. "the adopted son succeeds to the *sapinda* kinsmen of his father, and as regards the relationship of

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law, must be admitted. This is declared: relation of sapinda is of two descriptions—through consanguinity, and connection by a funeral oblation; of these the relation as sapinda arising from consanguinity being obviously barred in the case of the adopted son. Hemadri (after having declared the relation as arising alone from connection by a funeral oblation and consanguinity) has determined the relation of sapinda of sons given, and the rest, in the family of the adoptive father as extending only to the third degree.'

"Para. 38—'But, in the instance of the real legitimate son, is not thus the performance of the sapindakarana (for his father) with three forefathers only, established by holy writ? Being established then by this alone, for what purpose is the inconvenience of introducing another express text (to declare it)?' Anticipating this objection, the author subjoins—'therefore this, of adopted sons, is a relation of sapindas, extending only to the third degree, being productive of uncleanness and disability of marriage, and consisting in connection by funeral oblations,' &c., &c.

"Para. 39.—'Intending merely this, it is said by the author of the Sangraha—"The relation as sapinda of adopted sons extends to three degrees in the family of the natural father, and like that in the family of the adopter. This is a rule of law." The mention here of relation as sapinda in both families is with reference to the son of two fathers, for it has been shown that the ceremony *sapindakarana* of such son is performed with two sets of three forefathers. Of the absolutely adopted son, the relation of sapinda in the family of the adopter, consisting in connection by funeral oblations, extends to three degrees; in the family of the natural father, arising only from consanguinity, it extends to seven degrees; to enlarge would be useless.' Dattaka Chandrika, Sec. III, para. 16:—'In the same manner, by parity of reason, where there may be a diversity of mothers, the sires of the natural mothers are first designated by a son, who is son to two fathers at the funeral repast (suggested by the passage subjoined) in honor of the maternal grandsires; subsequently the sires of her who is the adoptive mother; where the paternal sires are honored, there certainly are the maternal.'

"Para. 17.—'But the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only, for he is capable of performing the funeral rites of that mother only; and thus, in conformity with the spirit of the sentence—"He is (destined) to continue the line of his ancestors," which is subjoined as the reason (in

sapinda, there is no difference between the adopted and the natural-born son." LECTURE XI.

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the text of Vas'ishtha) the prohibition (therein)—"let not a man give an only son" refers to an adopted son other than the dwyamushyayana, or son of both fathers; for (where the adopted son is such) no extinction of lineage ensues, as has already been declared.'

"Para. 18.—The relation as sapinda is next considered. This extends to three degrees in the family of the natural father, by reason of consanguinity, and in that of the adopter, through connection by the funeral cakes.

"Para. 50 of Sec. VI of Dattaka Mimansa.—'The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons).'

"Para. 51.—'As for what is said by Hemadri, that the precept enjoining the performance of funeral repast in honor of the maternal grandfather, refers to the natural maternal grandfather, that is inaccurate, for it is at variance with the passage—"of him who has given away his son, the obsequies fail." Nor is the capacity of the maternal grandsires as givers wanting, for, by reason of their affording their assent to the gift (as appears from this passage *having convened his kindred*, &c.) they also are parties to the same. Besides, by this passage—"the funeral cake follows the family and estate," the family and estate are declared to be the cause of performing the funeral repast, and the estate of the maternal grandfather also, like that of the father, lapses from the son given. His incapacity to perform a funeral repast in honor to his original maternal grandfather is properly declared.'

"Para 52.—'Accordingly, Hemadri himself, from not being satisfied with that (just stated), has advanced the other position. "In the same manner, as for the secondary father, a funeral repast must be performed in honor of the secondary maternal grandfather and the rest."'

It being thus established that the adopted son succeeds to the sapinda kinsmen of his father, and that as regards the relationship of sapinda there is no difference between the adopted and the natural-born son, the question before us is reduced to this,—Whether Gogan is a sapinda kinsman of Bhowany Kishore?

"A reference to the genealogical tree will show that the three immediate paternal ancestors of Gogan are the three immediate maternal ancestors of Bhowany Kishore. Bhowany Kishore, while living, was bound, in parvana rites, to offer funeral cakes to those three maternal ancestors. He now being dead, therefore, participates in the funeral offerings that

LECTURE XI.

This important judgment settles the point that an adopted son is the rightful heir of the cognate

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Gogan, on similar occasions, makes to the same three ancestors, who are his adoptive father, grandfather, and great grandfather; consequently Gogan and Bhowany Kishore are related to one another as sapindas in accordance with the definition of sapinda laid down in the Full Bench decision in *Guru Govind Shaha Mandal* v. *Anand Lall Ghose Mozumdar* (reported in Bengal Law Reports. Vol. V, p. 15). This definition is entirely in accordance with para. 38, Chap. XI, Sec. I, Dayabhaga; and para. 7, Chap. XI of the Dayatattwa.

"The conclusion at which the lower Court has arrived upon this point is, therefore, wholly opposed to the law as laid down in the Dattaka Chandrika and the Dattaka Mimansa, which are generally accepted as works of unquestionable authority on the subject of adoption.

"It has been contended before us that verse 8 of Chap. X of the Dayabhaga supports the conclusion of the lower Court, although it has not expressly referred to it. It is said that the 'son given' is not included amongst the first six kinds of sons who are declared to be heirs of kinsmen in that verse. This contention is clearly opposed to the ruling of the Judicial Committee in *Sumbhu Chunder Chowdry* v. *Naryany Debya* (Knapp's Report, Vol. III, p. 55). If we are to adopt this construction, we must hold that an adopted son cannot succeed collaterally at all—a position opposed to the uniform current of decided cases upon the subject. It is true, in some of these cases it has been taken for granted that the text in question of the Dayabhaga bears the construction for which the plaintiffs' counsel contends. But a careful examination of the immediately preceding verse, *viz.*, verse 7, will show that that is not the correct construction of verse 8.

"The author of the Dayabhaga deduces his conclusion in verse 8 from Devala's text referred to in verse 7. But it is not correct to say that the Devala's text places the 'son given' within the class of sons who are not heirs of kinsmen. Devala's text is not before us, and it may be that he, in reciting the twelve descriptions of sons, followed the order given in verse 7, because we find that the same text which is referred to in the Dattaka Chandrika and the Dattaka Mimansa and Colebrooke's Digest recites them in the same order. But the text, after reciting them in that order, classifies them thus, *viz.*,—(1) son begotten by a man himself, (2) or 'procreated by another,' (3) or 'received,' (4) or 'voluntarily given.' After having classified them in this manner, the text goes on to say, 'Among these the first six are heirs of kinsmen,' &c.

"It seems to me to be reasonable to hold that the phrase 'first six' here

sapindas sprung from his adoptive father's family. In the recent case of *Uma Sankar Maitra* v. *Kalikamal*

LECTURE XI.

Uma Sankar Maitra

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refers to the first six according to the classification immediately preceding, and not the first six according to the recital of the different descriptions of sons given in an earlier portion of the text. In a note by Srikrisna Tarkalankara, the order which the different descriptions of sons occupy according to the aforesaid classification is given, and it appears from it that the adopted son falls within the first six. It is evident, therefore, that, according to verse 8, the adopted son succeeds lineally as well as collaterally. This is the construction which, as already remarked, was adopted by the Judicial Committee in *Sambhu Chunder's case.*

"Of the European text-writers there is a consensus of opinion that the adopted son succeeds to the collateral relations of his adoptive father. They lay down this rule without any limitation. It is true that, in Macnaghten's Hindu Law, p. 78, it is laid down, on the authority of the decision of the Sudder Dewany Adawlut in the case of *Gangamya* v. *Kishen Kishore Chowdry* (Sel. Rep., Vol. III, p. 128), that an adopted son does not succeed to the relatives of the adoptive mother. Whether that position is right or wrong, it is not necessary to discuss in this case. Gogan does not lay claim to any property left by any of his maternal relatives, but to the property of Bhowany Kishore, who is related to him by adoption *ex parte paterna*. But upon the point whether the adopted son succeeds to his adoptive father's relatives, Mr. Macnaghten is at one with all the other European text-writers.

"The same view of the law is taken by Jagannatha in his Digest. After fully discussing this question at pages 270 to 273 of Vol. III, he comes to the conclusion that the adopted sons are heirs to kinsmen as well as to their own adoptive fathers. It remains to notice the gloss of Kalluka Bhatta, upon the sole basis of which the decision of the lower Court upon this point rests. As I have already remarked, if it really supported the view of the lower Court, its authority could not preponderate against that of the Dattaka Chandrika and the Dattaka Mimansa. But it seems to me that it does not warrant the conclusion arrived at by the lower Court. The gloss in question which is to be found in page 146 of Colebrooke's Digest, Vol. III, is to the following effect:—

"'Manu sprung from the self-existent Brahma and first of the fourteen Manus. Among these twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals, &c.'

"In the original the phrase (गोत्र दायाद) *gotra-dayada* stands for heirs to collaterals.' *Dayada* is equivalent to heirs, and *gotra* to family name.

LECTURE XI.

v. *Kalikamal Mazumdar.*

Mazumdar and others, the question was whether an adopted son takes by inheritance from the relatives of his adoptive mother in the same way as a son of the body. The question was referred to the Full Bench of the Calcutta High Court. In the opinion of the learned Judge delivering the judgment of the Court "the weight of authority preponderates in favor of the proposition that an *adopted son*, according to the true interpretation of the Hindu law prevailing in Bengal, *takes by inheritance from the relatives of his adoptive mother*."[1]

"It is said that *gotra dayada* means heirs of the persons bearing the same family name. It may be that this would be the meaning of the phrase above alluded to, if the letters are strictly adhered to. But it appears to me from the context that these words are intended to include all the collateral members of the famiily who stand in the relation of sapinda, &c., to the adopted son. But granting that the literal construction should be adhered to, does the text in question support the conclusion of the lower Court? It lays down simply that the first six kinds of sons are heirs to the kinsmen sprung from the same family. It is not necessarily implied thereby that any one of these six descriptions of sons is not entitled to inherit to the estate of a kinsman sprung from a different family. If that were so, the natural-born son would also be debarred from inheriting the wealth of such kinsmen. Now, as regards decided cases, it seems to me that the precise point raised before us is not touched by any one of them. The cases of *Mrinamoyi* v. *Bejoykristo* (Weekly Reporter, 1864, p. 121) and *Chinnarama Kistna Ayyar* v. *Minatchi Ammal* (Madras High Court Reports, Vol. VII, p. 245) relate to the right of the adopted son to succeed to the estate of the relatives of the adoptive mother, which is not the question here. In the other cases cited, the question whether the adopted son inherits to his adoptive father's relatives, who are sprung from a different family, did not arise."—I. L. R., 5 Calc., 615.

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[1] The following is the decision of the Full Bench :—

MITTER, J.—I think that the question referred to us should be answered in the affirmative. An adopted son, according to Hindu law, takes by

These two cases of *Padma Kumari Devi* and *Uma* LECTURE XI.

inheritance from the relatives of his adoptive mother in the same way as a legitimate son.

According to Hindu law, an adopted son occupies the same position, and has the same rights and privileges, in the family of the adopter as the legitimate son, except in a few specified instances which have been clearly and carefully noted and defined by writers on the subject of adoption.

The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it.

Nanda Pandita, in the *Dattaka Mimansa*, Sec. VI, paras. 50, 51, and 52, after laying down that the ancestors of the adoptive mother are the maternal ancestors of the adopted son, on the authority of certain Rishis mentioned therein in para. 53, supports that opinion thus upon general grounds :—" And this even is proper. The adopted son, as substitute for the legitimate son, being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the *manes* in honor of whom a legitimate son performs such repast. For, without difference, relation to the father and the other sires of the adopter obtains." The original of this passage is more clear upon this point. A more faithful translation of it would be as follows :—" For, without difference, relation to the father's family, &c., obtains." The author here, quite irrespective of the chapter and verse of the Rishis whom he quotes in paras. 51 and 52, supports his position on general grounds, and says, that there is no difference between an adopted son and a legitimate son in respect of his relationship to his adoptive " father's family, &c.," which words evidently, according to the author, indicate his (the adopted son's) relationship to the ancestors of the adoptive mother.

The cases in which there is a difference are all accurately defined both in the *Dattaka Chandrika* and the *Dattaka Mimansa*. It would not have been necessary to define accurately the points of difference, if in all other respects the position of an adopted son had not been exactly similar to that of a legitimate son.

Apart from the general ground, there is a clear and express text in the *Dattaka Mimansa*, which is cited below, showing that a child, after adoption, is not only completely severed from his own father's family, but also from his own maternal grandfather's family, and that he, by substitution, becomes connected to his adoptive father and mother's family as if they were his natural parents :—

" The forefathers of the adoptive mother only are also the maternal

LECTURE XI.

Sankar Maitra have finally settled the question that

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grandsires of sons given, and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons.)" *D. M. Sec.* VI, para. 50.

This case is governed by the authorities of the Bengal School, and it is now settled that the Law of Inheritance in this school is based substantially upon the theory of spiritual benefits. (*See* the Full Bench Decision reported at p. 15 of Vol. V of Bengal Law Reports.)

There is abundant authority both in the *Dattaka Chandrika* and the *Dattaka Mimansa* to establish that an adopted son confers on the father of the adoptive mother the same spiritual benefit which a legitimate son does.

Speaking of the *Parvana* rite (the rite which is chiefly taken into consideration on the question of spiritual benefit) the author of the *Dattaka Chandrika,* in para. 17, Sec. III, says:—" But the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only."

On this subject the author of the *Dattaka Mimansa* says:—

" As for what is said by Hemadri, that the precept enjoining the performance of a funeral repast in honor of the maternal grandfather, refers to the natural maternal grandfather, that is inaccurate, for it is at variance with the passage—' of him who has given away his son, the obsequies fail.' " Nor is the capacity of the maternal grandsires as givers wanting, for, by reason of their affording their assent to the gift (as appears from this passage ' having convened his kindred, &c.,') they also are parties to the same. Besides, by this passage, ' the funeral cake follows the family and estate '—the family and estate are declared to be the cause of performing the funeral repast, and the estate of the maternal grandfather also, like that of the father, lapses from the son given. His incapacity to perform a funeral repast in honor of his original maternal grandfather is properly declared."—*D. M., Sec.* VI, para. 51.

Accordingly, Hemadri himself from not being satisfied with that (just stated) has advanced the other position. " In the same manner as for the secondary father, a funeral repast must be performed in honor of the secondary maternal grandfather and the rest."—*D. M., Sec.* VI, para. 52.

It is, therefore, clear, that the adopted son confers the same spiritual benefit upon the relatives of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original

"the rights of an adopted son, unless contracted by

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mother. That being so, it would accord with the dictates of natural justice, as well as with the principles upon which the Law of Inheritance in the Bengal School is based, to hold that an adopted son succeeds to the property of the relatives of his adoptive mother in the same way as a legitimate son.

In para. 51, Sec. VI of the *Dattaka Mimansa* quoted above, Nanda Pandita (citing the text of Manu—"The funeral cake follows the family and estate") says, that "the family and estate are declared to be the cause of performing the funeral repast;" and he argues from it "that the estate of the maternal grandfather also, like that of the father, lapses from the son given." Exactly the same process of reasoning leads to the conclusion that the adopted son, losing his right of inheritance in the family of his original father and maternal grandfather, acquires similar rights in the family of his adoptive father and maternal grandfather, because the family estate is declared to be the cause of performing the funeral repast. The adopted son is, as shown above, bound to perform the funeral repast in honor of the *manes* of his adoptive mother's ancestors. Therefore the cause of this obligation, *viz.*, the right to inherit their estate, must follow.

In the *Dattaka Chandrika*, the right of the adopted son to take by inheritance from the relatives of his adoptive mother is declared in clear words.

After referring to certain contradictory texts of the ancient Rishis upon this subject, the author proceeds to reconcile them thus:—

"In the same manner, the doctrine of one holy saint that the son given is an heir to kinsmen, and that of another that he is not such heir, are to be reconciled by referring to the distinction of his being endued with good qualities or otherwise. By reason of succeeding to the estate of sapinda kinsmen as well as to that of the father, he is (argued by the one to be) heir to kinsmen; and on account of the particle 'only' in the phrase 'of the father only' (occurring in the passage subjoined) from inheriting merely of the father, he is (argued by the other not to be) such heir. Of these the first six are heirs to kinsmen: the other six of the father only."—*Dattaka Chandrika, Sec. V, para.* 22.

"And thus (the objection of) variation, from the son given being enumerated higher and lower in the order of inheritance and so forth by different holy saints respectively, is obviated by the distinction as to his qualities, good and bad."—*Ibid, para.* 23.

"Therefore, by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother

LECTURE XI. express texts, are in every respect similar to those of a

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or other kinsmen, where such son may not exist (the adopted son) takes the whole estate even."—*D. Ch., Sec. V, para.* 24.

The words "other kinsmen" in *para.* 24 clearly indicate sapinda kinsmen, because in para. 22 the author expressly says, that "by reason of succeeding to the estate of sapinda kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen."

Now, if the brother of the adoptive mother be a sapinda kinsman of the adopted son, then there cannot be any doubt that, according to this express authority, the latter inherits to the estate of the former.

According to the author of the *Dayabhaga*, the leading authority in the Bengal School, there cannot be any doubt that a maternal uncle is a sapinda of his sister's son.

This is clearly laid down in *para.* 19, *Section VI, Chapter XI of the Dayabhaga.* The translation of this passage as made by Mr. Colebrooke, with great deference to him, seems not to be strictly accurate. The correct rendering of this passage is as follows:—

"Therefore a kinsman, whether sprung from the family (of the deceased), though of different male descent, as his own daughter's son or his father's daughter's son, or sprung from a different family, as his maternal uncle or the like, being allied by a common funeral cake (*pinda*) on account of their presenting offerings to three ancestors in the paternal and the maternal family of the deceased owner, is a sapinda."

Therefore, as a legitimate son, being a *sapinda* of his maternal uncle, takes by inheritance from the latter, so does an adopted son inherit the estate of his maternal uncle by adoption under the express words of para. 24 cited above.

But it has been contended on behalf of the respondent that though the author of the *Dayabhaga* has, by an extension of the definition of the word '*sapinda*,' included in that class persons sprung from a different family and connected by a common '*pinda*,' yet, according to its ordinary signification as understood by the majority of the Hindu lawyers, it is limited to agnates, or persons connected with the deceased through an unbroken line of male descent. It is true that many Hindu lawyers use the word '*sapinda*' in this restricted sense, and it seems to me that the whole strength of the case on behalf of the respondent lies in this contention. We have, therefore, to determine in what sense the word '*sapinda*' is used both in the *Dattaka Chandrika* as well as in the *Dattaka Mimansa.*

In Sec. I, para. 1, the author of the *Dattaka Chandrika*, after laying down, on the authority of *Saunaka*, "that the adoption of a son by any Brahmin must be made from among sapindas," says in para. 11,

natural-born son: that an adopted son takes by LECTURE XI.

"that, by the use of the word *sapinda* in its general sense, it is meant from such, both of the same or a different family." Similarly, in the *Dattaka Mimansa* (Sec. XI, para. 3) the same text of *Saunaka* being cited, the following observation is made:—"From amongst sapindas," that is, amongst such kinsmen extending to the seventh degree inclusive; and the term being used in its general sense it follows, "*from among such* kinsmen belonging to the same or a different general family (gotra)."—*Dattaka Mimansa, Sec. XI, para* 3. These passages leave no room for doubt that both the *Dattaka Chandrika* and the *Dattaka Mimansa* held, that, according to the general sense of the term *sapinda*, it would include both agnates and cognates related by a common oblation. It is clear, therefore, that, according to the authority of both these treatises on the law of adoption, which treatises have been always accepted throughout India as conclusive on questions relating to it, an adopted son takes by inheritance from the relatives of his adopted mother. The learned pleaders on behalf of the respondent relied upon the authority of the *Dayabhaga*, and on a certain gloss of *Kulluka Bhatta* on a particular passage of Manu defining the rights of an adopted son. Exactly the same contention was raised before a Division Bench of this Court in the case of *Padmakumari Devi* v. *Jagatkishore Acharjee* (I. L. R., 5 Calc., 615), where a somewhat similar question was under consideration. In my judgment in that case I have fully given my reasons for overruling it. It is, therefore, unnecessary here to repeat the same grounds.

Therefore it is clear to me that, upon the original works on Hindu law, the weight of authority preponderates in favour of the contention that an adopted son succeeds to the estate of the relatives of his adoptive mother in the same way as a legitimate son. Of the European text-writers, the opinions of Sir T. Strange and Mr. Sutherland are in favor of the adopted son's rights. In *Macnaghten's Hindu Law, p.* 78, *Vol. 1*, the contrary view is expressed on the authority of the case of *Gunga Mya* v. *Kishen Kishore Chowdry*. at p. 128, 3 Select Reports, But this decision, as I shall presently show, is not any authority upon the point under consideration. There are very few decided cases bearing upon the question referred to us. The earliest case upon the subject is to be found in *Macnaghten's Hindu Law, Vol.* 2, *p.* 88. The decision there was in favor of the right of the adopted son. In a footnote to that case, Mr. Macnaghten apparently approved of the Pundit's opinion upon which the decision was based. The case of *Gunga Mya* v. *Kishen Kishore Chowdry* (3 Select Reports, p. 128), upon which the opinion of Mr. Macnaghten referred to above is based, is, as already stated, not a decision in point. There, one of two brothers died, leaving

LECTURE XI. inheritance from the relatives of his adoptive father and mother, in the same manner as a son begotten

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him surviving a widow and a daughter. In respect of his share the daughter, after the death of the widow, sued the surviving brother, who set up a gift made by the widow in accordance with an alleged direction left by the deceased. The daughter also alleged (most unnecessarily for the purposes of that case) that she had received from her husband authority to adopt, which she had not till then exercised. One of the questions referred to the Pundit was whether, after the death of the daughter, her adopted son, should she leave one, would succeed to the property of her father. The Pundit answered this question in the negative. But as it did not actually arise in that case, and as the right of the daughter to succeed to her father's estate was unquestionable, the Court, on finding the alleged gift not established, passed a decree in her favor without expressing any opinion on the question of the adopted son's right. Mr. Macnaghten was, therefore, mistaken in supposing that this case decided that an adopted son cannot succeed to the estate of his adoptive mother's relatives. In *Gunga Pershad Roy* v. *Brojessuri Chowdhrani* (Sudder Dewany Reports of 1859, p. 1091), the converse of the case before us arose. The question in that case was, whether the brother's son of the adoptive mother could succeed to the property left by his father's sister's adopted son. Upon the Pundit's opinion taken in that case, it was decided that he could. The case of *Gunga Mya* seems to have been cited, but it was considered to be not in point.

Then comes the case of *Morunmoyee Debee* v. *Bejoy Krishto Gossamee* (Weekly Reporter, Sp. No., p. 121), upon which the respondent's pleaders strongly rely. There the very question referred to us distinctly arose, and was decided against the right of the adopted son. The texts of the *Dattaka Chandrika* and the *Dattaka Mimansa*, extracted above, were not cited. The learned Judges were of opinion that the case of *Gunga Pershad Roy* was not in point, and based their decisions mainly upon the authority of *Gunga Mya* v. *Kissen Kishore Chowdry*. This latter decision, as already shown, is not an authority upon the point, and it seems to me that although in *Gunga Pershad Roy* v. *Brojessuri Chowdhrani* the converse question arose, that case virtually decided the point now under our consideration. If *A* is established to be the maternal grandfather of *B*, it follows as a matter of course that *B* is related to *A* as his daughter's son. The case of *Gunga Pershad Roy* v. *Brojessuri Chowdhrani* in effect established that an adopted son is related to the relatives of his adoptive mother as a son actually born of her. If the relationship is established, the rights and privileges which the Law of Inherit-

would take: and that there is no difference as regards sapinda relationship between the adopted and the natural-born son."[1] The only 'express texts' by which the heritable rights of an adopted son are 'contracted' refer to the case of his sharing the heritage with a legitimate son. In every other instance the adopted son and the son of the body stand exactly in same position.

LECTURE XI.

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ance attaches to it follow as a matter of course. The learned Judges in the case of *Morunmoyee Debee* v. *Bejoy Krishto Gossamee* (I say with due deference to their opinion) were wrong both in relying upon *Gunga Mya* v. *Kissen Kishore Chowdry* in support of their decision, as well as in distinguishing the case of *Gunga Pershad Roy* v. *Brojessuri Chowdhrani* from the one under their consideration. The Madras High Court, in the case of *Chinnarama Kristna Ayyar* v. *Minatchi Ammal* (7 Mad. H. C., 245) followed the ruling in *Morunmoyee Debee* v. *Bejoy Krishto Gossamee*, although the learned Judges who decided that case were of opinion that that ruling was opposed to the law as laid down in the *Dattaka Mimansa*. On the other hand, a Full Bench of the Allahabad High Court, in the recent case of *Sham Kuar* v. *Gayadin* (Ind. Law Reports, 1 All. Series, p. 252) refused to follow it, and laid down the law in favor of the adopted son's rights.

These are all the cases upon the point referred to us, and it seems to me that the weight of authority preponderates in favor of the proposition that an adopted son, according to the true interpretation of the Hindu law prevailing in Bengal, takes by inheritance from the relatives of his adoptive mother. I. L. R., 6 Calc., 256.

[1] *Joy Kishore Chowdhry* v. *Panchoo Baboo*, 4 C. L. R., 538; (S. C.) (nomine), *Puddo Kamari Debee* v. *Juggut Kishore Acharjee*, I. L. R., 5 Calc., 615.

LECTURE XII.

PRINCIPLES OF SUCCESSION UNDER THE MITAKSHARA LAW.

Mitakshara on lineal succession — Sons: equal distribution of property among them — *Per capita* — Grandsons: distribution *per stirpes* — Great grandson — His rights founded on two texts — Two texts of Yajnavalkya containing the whole Hindu law of inheritance — They determine the different classes of heirs — Ten in number — His enumeration not exhaustive, but illustrative — Number and priority determined by commentators and text-writers — Benares School — Consanguinity — Propinquity — Sir William Jones's translation of Manu's text (ix, 187) on inheritance not literal — A new translation proposed — The deceased and his heir must be *sapindas* — Application of the rule to sisters' son and grandson — Two principles derived from Manu's text, determining the heirs and the priority among them—Principle of propinquity applicable in determining order of succession among kinsmen who are not *sapindas* — Texts cited from Mitakshara — Conclusions from them — Meaning of the term 'propinquity'— Nearness of blood — Ascertained by the number of corporal particles — "Nearest degree of kindred to the deceased" — Criterion of propinquity — Not clearly indicated in the Mitakshara — But ascertainable from the Viramitrodaya's exposition — Propinquity through benefit — Conferred by the presentation of pindas at the parvana s'raddha — Connection between spiritual benefit and propinquity — Title to offer pindas not co-extensive with title to inheritance — It is simply a guide — Viramitrodaya's exposition accepted by the Privy Council — Propinquity founded on superior efficacy of oblations settles the precedence among rival claimants — When the heirs are known, the same principle determines the order of their succession — Hindu law of succession so difficult to unravel on account of its intimate connection with religion — Principle on which Hindu law is administered by the British Courts in India — List of heirs given in standard works not exhaustive — The general principles they have laid down applicable to each case according to its particular circumstances — Hindu law of succession in course of development — It contains within itself the principles of its own exposition — *Gotrajas*, or gentiles, exclude the *bandhus*, or cognates — This rule has been upheld by decided cases — Who are *gotrajas* — Those that are connected by birth and family name — Kinsmen on the paternal side related by blood, or descendants from the same stock — Gentiles classified into *sapindas* and *samanodakas* — Paternal grandmother, the first gotraja — Sapindas — According to Vijnanesvara, they include seven generations — They are blood relations — Yajnavalkya's texts — Forming the subject of comments in the Mitak-

LECTURE XII.

shara — Etymological sense of *sapinda* — Relationship through connection of the parts of the same body — The rule of obitual impurity among sapindas does not extend to the maternal family — Various meanings of the term *sapinda* — Definition already given too wide — Limitation to a certain fixed number — Enumeration made until the seventh degree — How a girl's relationship with a given person is reckoned — Summary of Vijnanesvara's views as to sapinda-relationship — Remarks made by Visvesvara Bhatta — Nilkantha — The term sapinda includes blood-relations within seven degrees of ascent and descent on the paternal side — The relationship does not rest on different basis for the purposes of inheritance and performance of ceremonies — Conclusion as to Vijnanesvara's meaning of sapinda — Medhatithi on sapindas — Seven generations of the same family — Sapinda-relationship ends with the seventh degree — Medhatithi's theory departed from by the author of the Mitakshara — Compromise between their systems effected by the followers of the Mitakshara — Smriti Chandrika — Nanda Pandita — Kamalakara — Dharma Sindhu, the latest work of the Benares School — Definition of sapinda forms the hinge on which turns the law of inheritance—Mitakshara's definition of *daya*, or heritage — Inheritance by reason of relation to the owner — Order of succession regulated by propinquity — Inchoate rights — Visvesvara Bhatta on heritage — Ballam Bhatta — Persons falling within the range of sapinda-relationship — Tabular sketch — Explanations — Descendants — Ascendants — Collaterals — Degrees of relationship how ascertained between collaterals — Sagotra sapindas — Mode of computing degrees of relationship among *bandhus* — Mother's line — Denotation of the term *bandhu* — All kinsmen related through females.

Mitakshara on lineal succession.

"Let sons," says the Mitakshara, "divide equally, both the effects and the debts, after the demise of their two parents.[1] Brethren should divide only in equal shares.[2]

"The wealth of the father, or of the paternal grandfather, becomes the property of his sons, or of his grandsons, in right of their being his sons or grandsons.[3]

"Grandsons have, by birth, a right in the grandfather's estate equally with sons.[4]

[1] Yajnavalka, II, 118; Mitakshara, I, 3. 1-2.
[2] Mitakshara, I, 3, 7. [3] *Ibid*, I, 1, 3. [4] *Ibid*, I, 5, 2.

LECTURE XII.

"In such property which was acquired by the paternal grandfather, the ownership of father and son is notorious.[1]

"It has been declared that sons and grandsons take the heritage."[2]

Sons: equal distribution of property among them.

It is obvious from the passages quoted above, that, according to the *Mitakshara*, the sons share equally in the property of their deceased father. Sons by different mothers inherit equally. Distribution is

Per capita.

made among them *per capita*, and not *per stirpes*; not according to the mothers, but with reference to the number of sons. "Where there is an equal number of sons," say Katyayana and Vrihaspati, "born of two or more different wives equal in degree, the distribution is to be regulated according to the mothers; but where the number of the sons (by different wives) is unequal, the distribution is to be regulated by the number of sons."[3]

Grandsons: distribution *per stirpes.*

In default of sons, the grandsons are entitled to succeed as heirs to their deceased grandfather. The grandsons take *per stirpes*. "Among grandsons by different fathers, the allotment of shares is according to the fathers."[4] "If unseparated brothers," says the Mitakshara, "die leaving male issue; and the number of sons be unequal, one having two sons, another

[1] Mitakshara, I, 5. 6.

[2] Mitakshara, II, 8, 1.

[3] Sumun Sing *v.* Khedun Sing, Sudder Dewany Adawlut, 1814, Vol. II, p. 116.

[4] Yajnavalkya, II, 121.

three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father."[1]

Lecture XII.

We thus see that the sons and grandsons take their natural position as heirs of the deceased proprietors. Their rights are acknowledged in *all* the schools without the slightest hesitation. They are welcomed as heirs, and enjoy, undisturbed, the heritage they receive from their father and grandfather.

Great grandson.

The great grandson, however, is not so fortunate. Considerable difficulty is experienced in *all* the schools to bring him in as an heir. All the ancient records have been ransacked for an authoritative text favouring his claim. But the search has proved entirely fruitless. Jimutavahana exclaims with no slight degree of irritation, "there is no separate text concerning the great grandson."[2]

His rights founded on two texts.

It was felt in all the schools, that the exclusion of the great grandson would be a very great hardship. He *must be* recognized as an heir, and placed immediately after the grandson. The Mitakshara has nowhere expressly mentioned him as an heir. But the followers of the Mitakshara have succeeded, after great labour, in finding two texts in Yajnavalkya's Code, which seem to them to give a certain semblance of authority, remote though it be, to acknowledge

[1] Mitakshara, I, 5. 2.

[2] XI, 1, 35.

LECTURE XII. the heritable right of the great grandson. The basis of their arguments is very slender; but slender as it is, they have been eagerly seized by the teachers of the Benares School, to found upon them the great grandson's title to inheritance. The texts we refer to are these:

"If a father has gone abroad, or died, or is subdued by calamity, his debts shall be paid by his *sons-and-grandsons*.[1]

"He who receives the estate, shall pay the debts (of the proprietors)."[2]

To an ordinary understanding these two texts would not convey much. We do not *easily* see, without a certain stretch of the imagination, how these texts can establish the title as an heir even of a grandson. As regards the great grandson, he is nowhere in the texts, but must be conjured up by the magic wand of the commentators. According to Mitra Misra, the great grandson lurks in the compound word *sons-and-grandsons*. The compound term, which is in the plural number, may be taken to mean sons, grandsons, and great grandsons. The great grandson may very properly be included in the grandson. It is impossible otherwise to account for the plural number of the compound word.[3]

We are used to all sorts of liberties being taken by commentators with their authors. But the inter-

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[1] Yajnavalkya, II, 51. [2] Yajnavalkya, II, 52.
[3] Viramitrodaya, III, 1, 11.

LECTURE XII.

pretation fixed by Mitra Misra upon the plural number in the compound in question puts to shame all the forced constructions and the discoveries of latent meanings which have been imagined by the celebrated commentators of every age. If this interpretation, Mitra Misra proceeds, be admitted, the texts referring to the liability of the great grandson to liquidate debts of his great grandfather can be easily explained.[1] He evidently alludes here to the passage of the Mitakshara, in which Vijnanesvara says,—" The grandson's son shall not be forced to pay, if he has not got any assets." [2] This passage would imply that " the grandson's son shall be forced to pay, if he has got any assets." What remote connection there may be between the payment of debts by the grandson's son, " if he has got any assets," and his right to succession, we leave to the casuists to find out. Be that as it may, it is a settled rule in the Benares School, that the great grandson is in the line of heirs, and his proper place is immediately after the grandson. Mitra Misra, Kamalakara, Balam Bhatta, and all the other teachers of the Benares School have all subscribed to this rule, and it is now universally acted upon.

Two texts of Yajnavalkya containing the whole Hindu Law of Inheritance.

The whole Hindu Law of Inheritance may be said in fact to be based upon the two following texts of Yajnavalkya :

" Among these (twelve sons) the next in order

[1] III, 1, 11.

[2] Mitakshara, II, 51-52.

LECTURE XII.

is heir, and presents funeral oblations on failure of the preceding."[1]

This shows that sons, principal and secondary, take the inheritance in the first instance. The order of succession among *all tribes and classes* on failure of them is next declared.[2]

"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles (*gotrajas*), cognates (*bandhus*), a pupil, and a fellow-student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue."[3]

If you thoroughly understand these two texts of Yajnavalkya, you have the whole law of inheritance within your grasp. The dicta of the other ancient sages, and the comments and glosses of the text-writers of the modern schools, simply serve to illustrate these maxims of Yajnavalkya. The whole law of inheritance thus lies in a nutshell. The process of generalisation has not of course stopped here. Jimutavahana and the other lawyers of the modern schools have extracted the essence of these simple propositions of the "contemplative saint," and have presented his maxims in a form which defies further analysis. Generalisation has with them reached its utmost limit, and further analysis seems to be impossible. We will explain our meaning as we proceed.

The enumeration and the classification of heirs given

[1] II, 135. [2] Mitakshara, II, 1. 1. [3] Yajnavalkya, II, 136-37.

by Yajnavalkya then form the basis of the Hindu Law of Inheritance. It will obviate a considerable amount of misapprehension if it be explained to you at the outset that the texts of Yajnavalkya do not give an *exhaustive* enumeration of heirs. They merely declare the different *classes* of heirs who are entitled to succeed, and determine their *order of succession.*

They determine the different classes of heirs.

We should look to these texts then for the various classes of heirs, and if we are ever doubtful as to the *order* in which they should take their places, we have to appeal to these texts to remove our doubts. Each preceding class of heirs must be thoroughly exhausted before we come to seek for heirs of the next class. The first class of heirs is the 'sons,' and the last, 'fellow-students.' The king, the *ultimus hæres* of Hindu Law, is not mentioned as an heir by Yajnavalkya, for reasons which have been dwelt on at length in a previous Lecture. We have thus *ten* classes of heirs :—

Ten in number.

1. Sons.
2. Widows.
3. Daughters, including their sons.
4. Parents.
5. Brothers.
6. Sons of brothers.
7. *Gotrajas* (gentiles).
8. *Bandhus* (cognates).
9. Pupils.
10. Fellow-students.

LECTURE XII.

His enumeration not exhaustive, but illustrative.

If you remember that Yajnavalkya's enumeration of heirs is *not exhaustive*, but simply illustrative, there will be no difficulty in reducing to harmony 'the conflicting dicta' and 'the discordant opinions' of Hindu jurists. With this clue in our hands, we shall be able to thread with safety all the mazes of the Law of Inheritance, "unconfounded by the perpetual conflict of discordant opinions and jarring deductions."

Number and priority determined by commentators and text-writers.

Yajnavalkya has fully determined the different classes of heirs. The distinctive marks of each class of heirs are unmistakable. We can easily distinguish one from the other. There is no necessity to characterize them any further. It remains now to define the different classes in such a manner as to fully bring out *all* the heirs contained in each class. The labours of the commentators, and the text-writers of the different schools, have been addressed to the determination of the number and priority of heirs comprised in each class.

Benares School.

With regard to the determination of this important point, the doctrines of the Benares School, represented by the Mitakshara, may be broadly stated as follows :—

Consanguinity.

'Consanguineous relation' to the deceased determines the number of the different heirs in each class; and the 'nearness' of each heir to the deceased determines his priority among the other heirs in that class. In other words, consanguinity determines the

heritable right, and propinquity the preferable right of a kinsman.

LECTURE XII.

To find out whether a given person belongs to any of the ten classes, we are to see whether he is related by blood to the deceased. We are to find out whether there is any blood-relationship between the given person and the deceased whose property he is to inherit. If no blood-relationship can be shown to exist between them, the given claimant must be rejected at once.

Propinquity.

If there is more than one claimant, priority among them is determined by the 'nearness' of each to the deceased. If they are equally near, or equally remote, they have equal right to the property of the deceased. Thus, two sons are equally near to the deceased, they share the property equally between them. Two brothers are equally near to the deceased, they have an equal right to the property of the deceased. The son is nearer to the deceased than the grandson, therefore the former excludes the latter. The nephew is more remote than the brother, therefore the nephew is excluded by the brother. Again, two grandsons, being equally remote from the deceased, share his property equally between them. So in the case of uncles, and others. Thus also the *equal* rights of the widows to the property of the deceased are easily deduced from this principle of 'propinquity.'

'Propinquity,' says the Mitakshara,[1] is the great

[1] Mitakshara, II, 3. 3-4.

LECTURE XII.

regulating principle in determining the *order* of succession among heirs. It is absolutely necessary, therefore, to understand thoroughly the governing principle which is applied to the solution of all questions of precedence among heirs.

This rule of propinquity is founded upon the following text of Manu:

"To the nearest *sapinda* the inheritance next belongs."[1]

Sir William Jones's translation of Manu's text on inheritance not literal.

This is Sir William Jones's rendering of the text we have referred to. It is not a literal translation. It is only an abstract rendering of an all-important text in matters of succession. The whole Hindu law of inheritance may very properly be said to depend upon a correct rendering of this passage. Sir William Jones has taken the gloss of Kulluka Bhatta, the celebrated commentator of Manu — a lawyer of the Bengal School—as his guide in the translation of the text in question. Kulluka Bhatta has not explained the passage in full; he has simply given the drift of it, from which the translation of Sir William Jones is taken. The translation of Sir William Jones is unexceptionable so far as it goes. What we submit with deference is, that it is not a *literal* translation of the text, and does not bring out clearly all the bearings of the principle of propinquity upon which so much stress has been laid by the lawyers of the different schools.

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[1] IX, 187.

We will attempt a fresh translation of this important text according to the gloss of Visvesvara Bhatta and Balam Bhatta, the well-known commentators of the Mitakshara:

A new translation proposed.

"Whoever is near to a *sapinda*, his property shall belong to him."[1] The explanation of the text proposed by Visvesvara Bhatta and Balam Bhatta is this, "The property of a near *sapinda* shall be that of a near *sapinda*."[2]

The deceased and his heir must be *sapindas.*

From this explanation of the text we shall be quite justified in inferring that Manu intended that the deceased proprietor should be a near *sapinda* of his successor; and that the successor also should be a near *sapinda* of the deceased proprietor whose property he inherits. In other words, the deceased proprietor and his heir must be nearly related to *each other* as *sapindas.* Unless it can be shown, therefore, that a given person is a near *sapinda* of the deceased proprietor, and the deceased proprietor also was a near *sapinda* of the claimant, he has no right to the inheritance in question, and must at once be rejected.

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[1] अनन्तरः सपिण्डाद् यः तस्य तस्य धनं भवेत् । Manu, 9. 187.

[2] यः सपिण्डात् अनन्तरः सन्निहितः तस्य सपिण्डसन्निहितस्य धनं सपिण्डसन्निहितस्य धनं भवेत् (Subodhini, M. S., p. 91*a*; Mitakshara, II. 3.3.)

सपिण्डादिति । "दूरान्तिकार्थै"रिति (Pan. II, 3. 34.) षष्ठ्यर्थे पञ्चमी । तथा च सपिण्डस्य योऽनन्तरः संन्निहितः तस्य सपिण्डस्य धनं तस्य सपिण्डसन्निहितस्य धनं भवेदित्यर्थः। (Balam Bhatta, M.S. 161a), Mitakshara, II, 3.3.

सपिण्डाद् योऽनन्तरः सन्निहितः प्रत्यासन्नः शरीरसम्बन्धेन तस्य प्रत्यासन्नस्य धनं सपिण्डस्य धनं भवेदित्यर्थः। (Madana Parijata, M.S. 235b).

Lecture XII.

Application of the rule to sister's son and grandson.

We will give an example in illustration of our meaning. By the canons of inheritance, a sister's son is a near *sapinda* of the deceased, and the deceased proprietor also was a near sapinda of his sister's son. Both of them answer to the conditions laid down by Manu : a sister's son, therefore, is entitled to the property of his maternal uncle. In the case of sister's grandson, the conditions insisted upon by Manu are also fulfilled. He, therefore, is also within the line of heirs. But neither *his* son, nor his grandson, fulfil those conditions. Therefore both of them must be rejected as heirs.

Two principles derived from Manu's text

We thus derive two important propositions from the text of Manu:

1. The property of a deceased proprietor belongs to his *nearest* sapinda.

2. The deceased and his heir must be related to *each other* as sapindas.

Determining the heirs and the priority among them.

The second principle determines the question as to who should be recognized as the heirs of a deceased person ; and the first principle determines the priority among them. If two persons are related to *each other* as sapindas, then one is heir of the other. If two persons are related as sapindas to the deceased, then the preference between the two claimants is decided by the principle of propinquity. The nearer excludes the more remote. The uncle is nearer to the deceased than the uncle's son. Therefore, the uncle excludes his son. The seventh in descent from the

grandfather is not a sapinda of the deceased; he is not, therefore, entitled to inherit as a sapinda. The sixth in descent from the father excludes by the principle of propinquity the sixth in descent from the grandfather, because the former is nearer to the deceased than the latter.

It is a settled rule then that the deceased and his heir must be sapindas of each other ; and the priority between two heirs, or two classes of heirs, is determined by the principle of propinquity.

Principle of propinquity applicable in determining order of succession among kinsmen who are not *sapindas*.

This principle of propinquity determines the *order* of succession not only among sapindas, but also among the other classes of kinsmen. It is a general rule, and is universally applicable. The *samanodakas* and *bandhus* also come within the operation of this rule. It is according to Vijnanesvara and all other Hindu jurists " the governing principle" in the law of succession, and should, therefore, be applied to the solution of every question of preference among heirs. It does not matter to what class of heirs the claimants belong. If two claimants are related as *samanodakas* to the deceased, we are only to see who is nearer to the deceased, and he is preferred to the more remote. If we are asked whether a given person is entitled to inherit as a *bandhu* of the deceased, we are first of all to find out whether the deceased and the claimant are related as *bandhus* to *each other*. If that question be answered in the affirmative, then we are to know for certain that the given claimant is

LECTURE XII.

an heir of the deceased. If two claimants satisfy the same conditions, then the other principle—the rule of propinquity—comes into force and determines the priority among them.

Texts cited from Mitakshara.

Let us see what the Mitakshara says on the subject. Vijnanesvara first applies this principle of propinquity in determining the order of succession among the two parents:

"The father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text, 'To the nearest *sapinda* the inheritance next belongs.'

"Nor is the claim in virtue of propinquity restricted to *sapindas;* but on the contrary, it appears from this very text that that rule of propinquity is effectual, *without any exception*, in the case of samanodakas, as well as other relatives, when they appear to have a claim to the succession."[1]

It is clear from the passage quoted above that the rule of propinquity is to be applied in determining the order of succession among *all* relatives, "without any exception," to ascertain their preferable rights.

Conclusions from them.

We are first of all to see, as I said before, whether they are *entitled* to succeed at all. Do they belong to any of the ten classes of heirs mentioned by Yajnavalkya? If they are *gotrajas*, are they related

[1] Mitakshara, II, 3. 3-4.

to the deceased as *sapindas*, or as *samanodakas?* If they belong to the class of *bandhus*, can they show that the deceased is connected with them as a *bandhu?* If all these points be satisfactorily established, we are then to apply the principle of propinquity to determine the question of precedence among heirs.

LECTURE XII.

But what is propinquity? It is "nearness of blood," declare the jurists of the Benares School. "Propinquity chiefly depends," says Visvesvara Bhatta in his Subodhini,[1] "upon an abundance of corporal particles." "One person can be near to another," he repeats in his Madana Parijata, "by corporal relation alone."[2]

Meaning of the term 'propinquity.'

"Propinquity, according to law and usage, should properly," says Balam Bhatta, "be understood to exist through the medium of corporal relation alone."

Thus we see the jurists of the Benares School insist upon propinquity being taken in the sense of "nearness of blood." Of two persons, according to their unique phraseology, one is nearer to the deceased than another, if he has a larger number of common corporal particles in his body. Take the case of the brother and nephew for instance. The

Nearness of blood

Ascertained by the number of corporal particles.

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[1] ... पुत्रे पित्रावयवबाहुल्यात् मात्रपेक्षया प्रत्यासत्त्यतिशयः एतदेव च प्रत्यासत्तेर्मूलकारणम् ...... (Subodhini, M.S. 90.)

सा च प्रत्यासत्तिः शास्त्रतो लोकतश्च यथातथमवयवान्वयादिद्वारेण बोध्या (Ballam Batta, M.S. 172a.)

[2] सन्निहितः प्रत्यासन्नः शरीरसम्बन्धेन..... (Madana Parijata, M.S. 235b).

LECTURE XII.

deceased, the brother, and the nephew are all descended from a common ancestor, the father of the deceased. All of them possess in their bodies corporal particles belonging to the father of the deceased. But the brother possesses a larger number of these particles than the nephew. The former is, therefore, nearer to the deceased than the latter. Both the son and the grandson are descended from the deceased. Both of them have in their bodies corporal particles belonging to the deceased. But the son possesses a larger number of these particles than the grandson. The son is, therefore, nearer to the deceased than the grandson.

"Nearest degree of kindred to the deceased."

By the term propinquity, there is meant nothing more nor less than "the nearest degree of kindred to the deceased." He who stands in the nearest degree of kindred to the deceased is preferred to one who stands in a remote degree of kindred to him.

Criterion of propinquity.

So far then the meaning of the word propinquity is quite clear. But how are we to ascertain in what degree of kindred a lineal descendant, or a collateral relative, stands to the deceased person? What is the test of propinquity? What are the distinctive marks by which propinquity should be known at once? Without any discriminative characteristics, it is impossible, in many cases, to distinguish between a nearer and a remoter relative. Take, for instance, the case of an uncle and a nephew. Both of them are three degrees removed from the deceased. Two

persons intervene between both of them and the deceased. No amount of nice discrimination would enable us to ascertain the exact proportion of corporal particles which one has in excess of the other. How then is the question of preferenee to be decided? It is necessary to define and restrict the rule of propinquity in such a manner that no ambiguous answer may be given by it when appealed to. The nearer line, we gather from the Mitakshara,[1] excludes a remoter line. The descendants of the deceased himself, for instance, would exclude the father's line. "On failure of the father's descendants, the line of the grandfather is entitled to inherit. On failure of the latter, the descendants of the great grandfather come in as heirs. In this manner up to the seventh generation must be understood the succession of kindred belonging to the same general family, and known as sapindas."[2]

We observe here that Vijnanesvara has shown us the way in which we are to apply the principle of propinquity in practice. It has been supposed by some that, according to the author of the Mitakshara, the nearer line excludes the remoter line; and *all* the heirs of a nearer line exclude those of a remoter line. According to this theory, *all* the descendants of the father, for instance, must be exhausted before we are at liberty to admit a single heir of the grandfather's line. The uncle must be postponed to brother's grandson's great grandson. If this theory be

[1] Chap. II, 5. [2] Mitakshara, II, 5. 4-5.

LECTURE XII.

correct, then the definition given of 'propinquity' by the jurists of the Benares School must fall to the ground. The corporal particles common to the deceased and his brother must have been in a very attenuated state when they reached brother's grandson's great grandson. At any rate, the uncle can show a larger number of such particles than the brother's grandson's great grandson. There are only two persons between the deceased and his uncle; whereas six persons intervene between the deceased and his brother's grandson's great grandson. To postpone the uncle to the brother's grandson's great grandson would be outraging common sense, and would be acting directly contrary to the spirit of the Mitakshara, and the definition of propinquity given by Visvesvara Bhatta and Balam Bhatta, the great expounders of the teachings of Vijnanesvara.

Not clearly indicated in the Mitakshara.

It is beyond doubt, however, that, according to the Mitakshara, the nearer line excludes a remoter line. The line of the deceased himself must be preferred to that of his father; the father's line to that of the grandfather; the grandfather's line to that of the great grandfather, and so on to the seventh generation upwards. But the question is, is it the intention of Vijnanesvara that *all* the heirs of each line must be wholly exhausted before those of a remoter line could be admitted? His intention is not clear from his words. The meaning is uncertain. The language of the text gives us no clue to what he

LECTURE XII.

intended to lay down. In this difficulty, the Lords of the Judicial Committee have given it as their authoritative opinion that "the Viramitrodaya is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and is declaratory of the law of the Benares School." [1]

But ascertainable from the Viramitrodaya's exposition.

Let us then refer to the Viramitrodaya for an exposition of Vijnanesvara's meaning. Mitra Misra will tell us how the term "propinquity" is interpreted according to the doctrines of the Benares School.

Propinquity through benefit.

Speaking of the benefits conferred upon the deceased proprietor by his descendants who are entitled to inherit his estate by reason of their propinquity to him, the Viramitrodaya remarks: "Propinquity by benefit is consistent with reason. Thus it is ordained, [2] 'By the eldest, at the time of his birth, the father, having begotten a son, discharges his debt to his own progenitors; the eldest son, therefore, ought to inherit from him.' Inasmuch as by the term 'therefore' the conferring of spiritual benefits is set down in the chapter on Inheritance, as a reason for getting the estate of the deceased, it is indicated that he alone is entitled to the property of the deceased who is capable of conferring the greatest amount of benefit on the late proprietor; and such propinquity is both natural and proper." [3]

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[1] 10 Weekly Reporter, P. C., 31. [2] Manu, 9, 106.
[3] Viramitrodaya, III, 1, 11.

LECTURE XII.

If the passage quoted above be attentively considered, we have here a clue to Vijnanesvara's meaning. Propinquity, we are told, is "the governing principle" in the Law of Inheritance. We have been told also that this propinquity is based upon "abundance of corporal particles." But we were left in the dark as to the distinctive marks by which we were to distinguish comparative propinquity. Comparative propinquity is evidenced, says Mitra Misra, by the amount of spiritual benefit conferred on the deceased proprietor. If you wish to know which of two given heirs is nearer to the deceased than the other, you are simply to find out which of them confers the greater amount of benefit upon the deceased. He who confers the largest amount of benefit upon the deceased is to be considered as nearest to him, and is entitled to his property, by reason of propinquity.

Conferred by the presentation of pindas at the parvana s'raddha.

Spiritual benefits can be conferred by the presentation of *pindas* in the *parvana* s'raddha held in honor of the deceased or his ancestors.[1] He, therefore, who can spiritually benefit the deceased by the presentation of a larger number of such *pindas*, is nearer to the deceased than another who is competent to present a less number to him. The brother, for instance, presents three *pindas*, in the paternal line, by which the deceased is benefited; while the uncle presents only two which confer any benefit on the deceased. The brother, therefore,

[1] Viramitrodaya, II, 1, 23*a* ; III, 1, 11 ; 2 1 ; 3. 1 ; 6. 2.

is nearer to the deceased than the uncle, and is, accordingly, preferred by reason of his greater propinquity.

LECTURE XII.

Connection between spiritual benefit and propinquity.

We often find, argues Mitra Misra,[1] that the subject of spiritual benefit is dwelt upon at length in chapters treating of inheritance. Discussions on spiritual benefit and explanations of the term propinquity—the governing principle in the law of inheritance—go side by side in chapters relating to division of heritage. What could be the object of discussing together subjects which are unconnected with each other? Is it not natural to suppose that there is an intimate connection between the two ; that the one in fact flows out of the other, or rather that spiritual benefit is a measure, a test of propinquity ? A near blood-relation alone would care to honor the memory of the dead, and present those exequial cakes to the spirit of the departed which would secure everlasting bliss to him. The nearer a person is to the deceased, the greater would be his ardour to pronounce those mystic formulæ, and offer those hallowed balls of rice and milk, in affectionate remembrance of a near kinsman. By the canons of exequial rites, the nearest kinsman presents the largest number of *pindas* by which the deceased is benefited. The number of *pindas* decreases with the diminution of propinquity. *Pindas* and propinquity, we thus see, are inseparably connected with each other. If we wish, therefore, to measure the degree of propinquity,

[1] Viramitrodaya, III, 5. 1.

LECTURE XII.

we have only to count the number of *pindas* which one kinsman offers to the deceased in excess of the other, and then the degree of propinquity is ascertained at once. Blood-relations alone are entitled in the first instance to celebrate *parvana* rites of the deceased, and their competence to present the pindas is in proportion to their nearness to the deceased relative. If we know the one we know the other. If we know the degree of propinquity in which a given relative stands to the deceased, we know the number of pindas which he is entitled to offer to the deceased; and *vice versâ*, if we know the number of *pindas* which a given relative presents to his deceased kinsman, we know the degree of propinquity in which he stands to the deceased. The intimate connection of propinquity in this way with the competence to celebrate exequial rites furnishes an exact measure of the different degrees of "nearness of blood."

If this view, says Mitra Misra, of the intimate connection between propinquity and the conferring of spiritual benefit be accepted as correct, "all the conflicting texts with regard to the order of succession can be reconciled by reference to the distinction of the heir's being endued with good qualities or otherwise, and to the greatness or smallness of benefits conferred on the proprietor. Any other mode of reconciliation would be like catching at straw and stubble,—utterly worthless."[1]

[1] Viramitrodaya, III, 5. 1.

LECTURE XII.

But it should be distinctly understood, says Mitra Misra, in another place,[1] that "the title to present exequial pindas is *not* the sole ground of taking the inheritance, for the younger brothers are equally entitled to the inheritance, although in presence of the eldest brother the younger brothers are not entitled to present those offerings. The younger brothers share with the eldest, because the competence to present those offerings is not extinct in them."

Title to offer pindas not co-extensive with title to inheritance.

Far be it from us, he seems to say, that the title to present *pindas* and the title to inheritance are co-extensive terms. One is not the effect of the other. The former does not necessarily imply the latter. What we simply mean to say is, that the competence to present pindas is a test—a measure of the degree of propinquity in which a given relative stands to the deceased. "Where there are many claimants to the heritage, amongst the *gotrajas* (gentiles) and the like, then the fact of conferring benefits on the deceased merely settles the question of precedence among heirs."[2] In other words, the competence to present exequial cakes does not create the heritable right, but determines only the preferable right. It simply furnishes the principle of selection founded on superior efficacy of oblations. It determines the priority among heirs. It shows the nearer heirs who exclude the more remote. "The conferring of spiritual benefits must never be accepted as the sole

It is simply a guide.

[1] Viramitrodaya, II, 1, 23. [2] *Ibid.*

LECTURE XII.

ground of taking the inheritance." It is simply a guide, and must not be confounded as its cause. The competence to present funeral oblations simply determines, as we said, the *preferable* right, and nothing more.

Viramitrodaya's exposition accepted by the Privy Council.

The Judicial Committee of the Privy Council have virtually taken the same view of the question. "When a question of preference arises," they say, "as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindus), *viz.*, who best can confer on the deceased, and his ancestors not fully benefited, the benefits which the grades of oblations offer in differing degrees."[1]

It follows from this, that questions of precedence among heirs must be settled by the principle of superior efficacy of oblations—that the preferable right to perform the s'raddha governs also the preferable right to succession to property.

Propinquity founded on superior efficacy of oblations settles the precedence among rival claimants.

It is quite clear then that in a question of priority between two persons claiming as heirs, or between two classes of heirs, the principle of propinquity founded on superior efficacy of oblations determines the precedence among contending kindred. The

[1] Bhya Ram Sing *v.* Bhya Ugur Sing, 2 Sutherland's Privy Council Rep., p. 332.

principle of propinquity is to be applied when the heirs have been found, and the mere question is—Who is to be preferred, and who should be excluded? The principle of propinquity founded on superior efficacy of oblations returns no ambiguous answer to this question. He who confers the greatest amount of benefit on the deceased, entirely excludes those who confer inferior benefits. If opposing parties confer benefits in equal degree, they have an equal right to the inheritance. The competence to confer spiritual benefits on the deceased, thus exactly measures the degree of kindred in which a given claimant stands to the late proprietor, and is an infallible guide in determining the preferable right to succession.

When the heirs are known, the same principle determines the order of their succession.

The principle of propinquity determines the *order* of succession among heirs, when we know who the heirs are. It is of no use to us when we wish to find the persons who are entitled as a class to succeed to the property of the deceased. But if you give me the heirs, I will tell you by the help of the principle of propinquity who should be preferred, and who should be excluded. But how are we to know those persons who are in the line of heirs? What are the distinctive marks by which an heir is known? We know how Yajnavalkya and Vijnanesvara have answered this question. A given person, according to them, is in the line of heirs, if he can be shown to belong to any of the ten classes enumerated by the "contemplative saint." In the first six

LECTURE XII.

classes, the heirs can be found without much difficulty. The lawyers of the different schools have settled, without much difference, the question as to who should belong to those classes. The points of difference among them refer mainly to the application of the principle of propinquity in determining the priority among them. The jurists are generally agreed as to the *persons* who should be included in those classes as heirs.

Hindu Law of Succession so difficult to unravel on account of its intimate connection with religion.

But the war has long raged, and is still raging, between the lawyers of the different schools with reference to the question as to who are those persons that should be classed as *gotrajas* or gentiles, and *bandhus* or cognates. The question has not yet been satisfactorily settled. The conflicting texts of the ancient lawyers, and the jarring legal *dicta* of the present day, make confusion worse confounded. By a slow and laborious process of discrimination, "this vexed and difficult subject—the Hindu Law of Succession"—is being gradually cleared up by the British legislators. The difficulty of the task arises from the fact that Hindu law is to be administered in accordance with the religious teachings of the Hindus. In the Hindu Law of Inheritance, those heirs are selected to take the inheritance who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.[1] It is this intimate connection of the Law of Inheritance

[1] 9 Bengal Law Rep., P. C., 394.

with the Hindu religious law which makes the Law of Succession so difficult to approach. You can easily imagine the difficulties by which the subject is beset—difficulties raised by varying opinions, decisions, and comments on conflicting texts. The British Courts approach this delicate subject "with an unfeigned desire to decide it in harmony with the religious feeling of the Hindus." The Hindu Law, says the Privy Council, contains in itself the principles of its own exposition. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies.[1] We thus see with what anxious solicitude this difficult subject is approached by the Courts administering Hindu Law. Every step is taken with extreme caution, and every question is decided in harmony with the spirit of written law and in conformity with approved usage.

In the case of *Ganendra Mohun Tagore* v. *Upendra Mohun Tagore*, the Calcutta High Court very justly observed: "The Hindu Law of Inheritance is based upon the Hindu religion, and we must be cautious that in administering Hindu law we do not, by acting upon our notions derived from English law, inadvertently wound or offend the religious feelings of those who may be affected by our decisions; or lay down principles at variance with the religions of those whose law we are administering."[2]

[1] 2 Sutherland's Privy Council Rep., 332.

[2] 4 Bengal Law Rep., 103.

LECTURE XII.

Principle on which Hindu Law is administered by the British Courts in India.

In the *Ramnad case*, the Madras High Court also very properly remarked:[1] "In the administration of Hindu Law, we are, it seems to us, peculiarly bound to look at the reason of the law and the analogies derivable, not from other systems or modes of thought, but from such as we find in the system itself. In this respect we are only following the course observable in the administration of all systems of positive law. We are not at liberty as judges to manufacture principles of law anomalous because inconsistent with those of the system into which we seek to introduce them, but we are bound to apply to new cases or circumstances existing principles, and to push them to their natural, because logically derivable, conclusions. It may be, indeed, that the principle so to be applied is itself an anomaly, inconsistent with the general body of the law, but too firmly fixed by judicial decision to be now disturbed. Where this is so, a Court may very properly refuse to push it any further, but only because the extension is forbidden by other principles with which the anomaly is in conflict."

List of heirs given in standard works not exhaustive.

It often happens that the standard treatises on Hindu Law have, after defining the principles on which the Law of Succession is to be based, given only a limited number of examples in illustration of the principles laid down. It would be absurd to suppose that the illustrations alone embody the

[1] 2 Madras High Court Rep., 224.

law, and that the principles only serve to *illustrate* the spirit of the law. It would be more natural to infer that the principles are to be applied, as in every other system of positive law, in determining the rule which ought to govern every new combination of particular circumstances. In the absence of any express law, the existing principles should certainly be pushed to their logical consequences. What is done every day in other departments of law should also be done in construing Hindu law. We see no reason why Hindu law should be treated as an exceptional subject, which has nothing in common with other branches of law. Look at the reason of the law and the "analogies derivable," and push the existing principles, in accordance with the Hindu mode of exposition "to their natural, because logically derivable consequences." In the exposition of the principles, for instance, upon which the Law of Succession of the Benares School is founded, it would not be proper to confine ourselves "to the four corners of the Mitakshara."[1]

LECTURE XII.

The general principles they have laid down applicable to each case according to its particular circumstances.

It is the custom of Hindu jurists not to give an exhaustive treatment of a given subject, but only to give certain broad hints by which the principles explained may be reduced to their logical consequences. They simply show the way—indicate the direction in which we are to proceed in elaborating and illustrating the principles which govern the Law of

[1] 10 Weekly Reporter, Privy Council, 31.

LECTURE XII.

Succession. Follow the hints given, and the true intention of the legislators will be perceived at once. The door is left open, and an attentive consideration will show that it was not the object of the Hindu legislators to codify the Law of Succession in such a way, that any further development of it would be impossible. As society progresses, and circumstances change, the old principles must be viewed in a new light and adapted to meet the present social exigencies. It would be wrong to suppose that the Law of Succession has been totally petrified, and admits of no further growth. Grow it must with the growth of society. There is a growing disinclination in the Courts of the country to treat Hindu law as an inanimate carcase, but to look upon it as a living organism, which is capable of meeting all social requirements. Life has been extinguished in different parts of the old structure, but they are being replaced by others which perform the functions which modern society requires of them. There is great vitality in Hindu law, and if we only know the way in which its vital powers can be preserved, we shall see that it yet has a long career before it. Hindu Law, to use the language of the Privy Council, contains in itself the principles of its own exposition. In interpreting the maxims of Hindu law, these judicious remarks should be constantly borne in mind, and no *new* principles should be manufactured from fanciful analogies. Hindu law can never assimilate foreign

Hindu Law of Succession in course of development.

It contains within itself the principles of its own exposition.

elements, which may be thrust upon it by well-meaning judges, and it is utterly needless, therefore, to try to infuse into it a spirit which is in every respect uncongenial to it.

To return from this digression :

Gotrajas or gentiles exclude the *bandhus* or cognates.

The *gotrajas* (gentiles) and the *bandhus* (cognates) belong respectively to the seventh and eighth classes of heirs. Yajnavalkya and Vijnanesvara concur in laying it down that the *gotrajas* exclude the *bandhus*.[1] The latter are not entitled to succeed till the gentiles, as a class, are thoroughly exhausted. If there be *one* gotraja, however remotely he may be related to the deceased, he will be preferred as an heir by the canons of succession to the nearest *bandhu*. After enumerating the different classes of heirs, Yajnavalkya says, you remember, that "on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue."[2] The Mitakshara thus explains this passage : "He who has no son of any among the twelve descriptions above stated[3] is one having 'no male issue.' Of a man thus leaving no male progeny, and going to heaven, or departing for another world, the heir or successor is that person among such as have been here enumerated (*viz.*, the wife and the rest) who is next in order, on failure of the first mentioned respectively."[4] There cannot be

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[1] Mitakshara, II, 2-3.
[2] Yajnavalkya, II, 136.
[3] I, 11. 1.
[4] II, 1-3.

LECTURE XII.

the shadow of a doubt, therefore, that there is express law to the effect, that the *gotrajas* as a class exclude the *bandhus*. Both Yajnavalkya and Vijnanesvara distinctly declare the whole class of gentiles, and the whole class of cognates, to be heritable, and not merely *some persons* found in them. They are each entitled to inherit as a class, and each class must be thoroughly exhausted before we come to the next succeeding class. "On failure of gentiles," repeats Vijnanesvara,[1] "the cognates are heirs." The language is plain enough. The whole class of *gotrajas* is declared heritable. Where, therefore, no sexual or personal incapacity exists, no ground can be shown to justify a sentence of exclusion from inheritance with regard to any person who has the least claim to the class of *gotrajas*.

This rule has been upheld by decided cases.

This question of priority among the gentiles and cognates has been settled by a uniform course of decision. It has been repeatedly held that gentiles must be exhausted before the cognates can succeed.[2] The Privy Council very justly remarks,[3] "that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason." The pre-

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[1] II, 6.1.

[2] Rutcheputty Dutt Jha *v.* Rajendra Narain Rao, 2 Sutherland's Privy Council Rep., 1; Bhya Ram Sing *v.* Bhya Ugar Sing, 14 Weekly Reporter, Privy Council, 1; Thakur Jibhath Sing *v.* The Court of Wards, 14 Weekly Repoter, 17; M. Dig Dayi *v.* Bhatan Lal, 11 Weekly Reporter, 500.

[3] Ind. Law Rep., 4 Calc., 755.

Lecture XII.

ference of the class *gotrajas* to the *bandhus*, is not opposed to the spirit and principles of the law of the Mitakshara ; on the contrary, there is express authority, as we have shown, which declares in unmistakable terms that the gentiles must be exhausted before the cognates can succeed.

Who are *gotrajas*?

But who are the gentiles or *gotrajas* ? The Mitakshara does not give a direct answer to this question. This is what it says : " If there be not even brother's sons, gentiles share the estate. Gentiles are the paternal grandmother, sapindas, and samanodakas." [1]

The commentators on the Mitakshara unanimously declare that " the paternal grandmother," "sapindas," and " samanodakas " are distinct words.[2] This is simply to show that all the three words must be treated as separate from each other, and must be separately referred to the deceased.

Now the meaning of " the paternal grandmother " is plain enough. " She is father's mother." [3] Vijnanesvara next tells us, on the authority of Vrihat Manu, who the *sapindas* and *samanodakas* are. " The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas* extends to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and name extends." [4] " The *samanodakas*," he adds, " must be understood to reach to seven degrees beyond the kindred known

[1] Mitakshara, II, 5. 1.
[2] Subodhini, 93*a*.
[3] II, 5. 2.
[4] II, 5-6.

LECTURE XII.

as *sapindas;* or else, as far as the limits of knowledge as to birth and name extend."

The last clause virtually gives us a definition of the term *gotraja.* The differentia conveyed in the words, "as far as the limits of knowledge as to birth and name extend," are found equally in *sapindas* and *samanodakas.* The latter term then includes the former. *All* sapindas are *samanodakas*, but the *samanodakas* are not necessarily sapindas. A person is a *gotraja* of the deceased, if it can be established that he and the deceased are descended from a common ancestor.[1] Two persons then are *gotrajas* if their name and lineage could be traced to a common male ancestor. Seven generations are related to each other as *sapindas.* All the other generations, "if the memory of their birth and name" is preserved, are related to each other as *samanodakas.* The sapindas fulfil all the conditions which are necessary to constitute *samanodakas.* If you analyse the expression "as far as the limits of knowledge as to birth and name extend," you will find, as I said before, that it comprehends not only the *samanodakas*, but the *sapindas*, and the paternal grandmother also. In this expression the word "name" evidently signifies "family name," or gotra.[2] Those then are *grotrajas* who are connected with each other by

Those that are connected by birth and family name.

[1] अस्मात् पुरुषात् अयं जातः इति ज्ञानाभावे अस्मत्कुलजाता इत्येवमाकार-ज्ञानमात्रगोचरा गोत्रजा इत्युच्यते ॥

[2] Vrihat Manu quoted in Mitakshara, II, 5, 6.

LECTURE XII.

'birth' and 'gotra.' A given person is a *gotraja* of the deceased, if he is connected with the deceased by 'birth' and 'gotra.' All the paternal ancestors and *their wives* (*viz.*, the grandmother, great grandmother, etc.,) are 'gotrajas' of the deceased, because the latter owes his 'birth' to them, and is of the same gotra with them. *All the descendants* of the deceased are his 'gotrajas,' because they are all descended from him, and bear his family name (gotra). *All collateral kinsmen* of the deceased are his *gotrajas*, because they are descended from a common ancestor, and are of the same gotra. If this definition of the term gotrajas be correct, it will exclude the wives of collateral kinsmen, because, although they are of the same gotra, by marriage, of the deceased, the relation of 'birth' does not exist between them and the deceased. Look upon the term from any point of view you like, you will find that the word *gotraja* includes all kinsmen on the paternal side who are related by *blood* with the deceased. It is not a fictitious relationship, but a real kinsmanship. Real consanguinity is the great characteristic of this relationship, and it has no connection whatever with affinity by marriage. Gotraja-relationship, then, is "the connexion or relation of persons descended from the same stock or common ancestor." It includes lineal and collateral consanguinity. It not only includes male kinsmen, but includes also female ancestors from whom the deceased is descended.

Kinsmen on the paternal side related by blood,

or descendants from the same stock.

LECTURE XII.

"The gentiles or gotraja, from the gotra," says the Privy Council, "are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing possibly many families, and such original bond of union is regarded as necessary to the constitution of the gotra. These conditions are all that are stated as necessary to the constitution of the class of gentiles."[1] Those then that can show a common ancestor, a common gotra, "a community of family, a descent which extended to the deceased and themselves," satisfy every condition of the texts [2] defining the term *gotraja*, and may be classed as gotrajas; and as such are entitled to succeed before *bandhus*.

Gentiles classified into *sapindas* and *samanodakas*.

As regulating preference of succession amongst them, the law of succession amongst gentiles classifies them further as sapindas and samanodakas.[3] "Among the gotrajas," says the Mitakshara, "in the first place the paternal grandmother takes the inheritance." After refuting the statement that the paternal grandmother should succeed after the mother, Vijnanesvara concludes, "she must, therefore, of course, succeed immediately after the brother's son." The word 'son,' as I have shown to you, includes also the 'grandson;' the paternal grandmother, therefore, inherits after the brother's grandson.

[1] 2 Sutherland's Privy Council Reports, 332.
[2] *Ibid.* [3] *Ibid.*

The paternal grandmother then is the *first* gotraja who is preferred to the other gentiles. We have here got the first term of the series. We must find out the others.

LECTURE XII.

Paternal grandmother, the first gotraja.

Immediately after the grandmother come the other *gotrajas;* and amongst them the sapindas take precedence.

Now who are those kinsmen that are known as sapindas? We will now answer this question.

Sapindas.

The word *sapinda* has been the subject of many a hard-fought fight. In the history of this word is wrapped up the whole history of the law of inheritance. Whether 'pinda' in the compound word 'sapinda' should mean *body*, or whether it should mean *oblations*, has been the subject of warm discussion among Hindu lawyers. To Gautama, Baudhayana, and the other ancient legislators, it mattered very little whether *pinda* signified 'body' or oblations. I say it mattered very little to them whether the *sapinda* relationship was based upon 'consanguinity,' or upon "the competence to perform exequial ceremonies," because those who were bound by ties of blood lived within the same family precints, and were bound also to offer those holy *pindas* which spiritually benefited the deceased. The property was never allowed to go out of the family. Those who formed the family-group were alone entitled to succeed, and it was in very exceptional cases that the property was allowed to go out

LECTURE XII. of the family. If the deceased was associated with his brethren, then, as now, the property remained in the family. The perpetuation of the family and the performance of the exequial ceremonies were inseparably connected together. Those who undertook to perpetuate the family were also bound to perform the exequial rites. Those who perpetuated the family name received the family property, and presented the exequial *pindas* to the deceased. It never happened that one class of men received the property and another class of persons performed these ceremonies. The nearest kinsmen received the property, and the nearest kinsmen performed the *s′ráddha* in honor of the deceased. It was only when the family was disintegrated, when the property came to be distributed among persons who owed no allegiance to the primitive family ; when it was necessary to introduce a class of men as heirs, who were not bound by religion to perform the s′raddha rites, that a sharp distinction was to be made with regard to those persons who received the property simply by virtue of their consanguinity to the deceased, though they were *not competent* to perform the exequial rites. But we will not anticipate. Let us first of all hear what Vijnanesvara has to say about the class of heirs known as *sapindas.* They are, according to him, entitled to succeed immediately after the paternal grandmother.

" The relation of the sapindas," he says, on the authority of Vriddha Manu, in the chapter on

Lecture XII.

Inheritance, "ceases with the seventh person (generation)."[1] This statement occurs in the section treating of the succession among *gotrajas*. This definition of sapinda then relates to *sagotra sapindas* in the first place. By this definition then seven generations of persons are related to each other as *sapindas*. It does not appear from this definition whether it includes lineal ascendants and descendants only, or whether it includes them and collateral kinsmen also. Let us see whether Vijnanesvara has, in any other part of his work, given a definition which tallies with this, and may serve to explain it in all its bearings.

According to Vijnanesvara they include seven generations.

They are blood-relations.

We find Vijnanesvara quoting the same definition of the sapinda relationship in the chapter on the s´ráddha ceremonies. This chapter, you should remember, is in the first book of the Mitakshara, while the chapter on inheritance is in the second book. Vijnanesvara is discussing the various theories relating to the first anniversary rites. Manu's definition of the sapinda-relationship, *viz.*, "the sapinda-relationship ceases with the seventh person"[2]—which is universally adopted as the true definition—is quoted. Our author then remarks: "Sapinda-relationship does not arise from connection through oblations presented to the manes, for (the relationship) would not then be comprehensive; but, as has been explained by me before, from the connection through parts of the same

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[1] Mitakshara, II. V. 6. [2] Manu, V, 60.

LECTURE XII. body."[1] We have given a literal translation of the passage.

What the author means is this : "In the definition of the sapinda-relationship—'the relation of the sapindas ceases with the seventh person' (generation)—this relationship must be based on consanguinity, and not upon connection arising from presentation of exequial *pindas*. Sapindas are blood relations, and *not* those who spiritually benefit the deceased by presenting oblations to him. If you say that the relationship is founded on the connection arising from the presentation of oblations, then your definition has the defect of non-comprehensiveness. The definition in that case is not exhaustive. It excludes persons from the class of *sapindas* who are universally included in this class. This point has already been explained by me at length in another part of the book."

Here we see that Vijnanesvara repudiates the theory that *sapindas* are persons connected by exequial pindas ; they are consanguineous relations — kinsmen of the deceased related by consanguinity. Had Vijnanesvara *ever* intended that sapinda-relationship should be founded on the connection by exequial pindas, the chapter on the s′ráddha rites would have been the proper place to explain this. Instead of countenancing the

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[1] Mitakshara, I, 252-3.

theory that exequial *pindas* should form the basis of the sapinda-relationship, he angrily rejects it, and strongly insists upon the proposition that even in the canons relating to the s'ráddha rites, wherever the word *sapinda* occurs, it should be construed as "a blood relation." The definition of the *sapinda*-relationship given in the chapter on Inheritance, is the same as that given in the chapter on the S'ráddha rites. In the chapter on the S'ráddha rites, the word *sapinda* in the definition is taken to mean "a blood relation;" the same word in the definition of the same relationship in the chapter on Inheritance cannot but be taken in the same sense, *viz.*, "a blood relation." The wording of the definition in the two places is exactly the same—"the relation of the sapindas ceases with the seventh person" (generation);—the conclusion, therefore, is irresistible that the word sapinda is taken in the sense of "a blood relation" in both places.

LECTURE XII.

Vijnanesvara says: "That the sapinda-relationship is based upon the community of corporal particles, and *not* on exequial *pindas*, has been explained by me at lengh in another place." Let us refer to that place thus pointedly alluded to, and see how he has expounded his theory of the sapinda-relationship.

This theory is explained at length in the chapter on Marriage in the first book of his treatise.

Yajna-valkya's texts.

Before extracting the remarks of Vijnanesvara on the sapinda-relationship, we will reproduce texts

LECTURE XII.

of Yajnavalkya upon which the comments of the Mitakshara are based, and which gave rise to Vijnanesvara's exposition of the sapinda-relationship.

"Having given a present to his preceptor, he should perform, with his permission, the ablution (prescribed for the conclusion of studentship). Having completed the study of a Veda, or having performed the duties (*prescribed for a student*), or having done both,—[1]

"Persevering in holiness, let him marry an auspicious woman; one not previously married or deflowered; beautiful; *unrelated to him as a sapinda;* his junior,—[2]

"Free from disease; having a brother; not descended from a person who follows the same rishi or saint, and not of the same gotra with him; and (*who is*) *beyond the fifth and seventh degrees on the mother's side and the father's side respectively.*[3]

"From an illustrious race of Brahmins well versed in holy writ, of whom ten ancestors are known, (the bride must be taken,) but not from a family suffering from an infectious disorder, though high in rank and fortune."[4]

The verses 51 and 54 immediately precede and follow the two texts with which we are concerned at present.

Forming the subject of comment in the Mitakshara.

The Mitakshara is commenting on the expression "*unrelated to him as a sapinda.*" In the original the word which forms the subject of comment is

[1] I, 51. [2] I, 52. [3] I, 53. [4] I, 54.

a-sapinda : *a* is a privitive particle ; so that *a-sapinda* means *not a sapinda*.

LECTURE XII.

Etymological sense of *sapinda*.

"The word *sapinda* is a compound word made up of *sa* and *pinda*. *Sa* or *samana* means 'same,' and *pinda*, 'body.' The word *sapinda*, therefore, means a person who has particles of the same body. One who does not possess parts of the same body is not a *sapinda*. Sapinda-relationship thus exists through connection of the parts of the same body. For example, there is sapinda-relationship between the son and his father by reason of the connection of the parts of the son's body with those of his father's. In this way there is sapinda-relationship between him and his grandfather and others by reason of the connection of his body with theirs through the father. Thus with the mother, by reason of the connection of his body with the mother's. Likewise with the maternal grandfather and other (kinsmen) through the mother. And so even with the mother's sister and her brother and other (maternal relatives) by reason of their connection with the same body. So also with the paternal uncles, paternal aunts, and others. So with the wife by reason of her being a common generator of the same body (the son). In this way sapinda-relationship mutually exists between the wives of (different) brothers (as also between them and their husband's brother, etc.,) by reason of their producing a body (the sons) in conjunction with those who are descended from a common progenitor. *Wherever*,

Relationship through connection of the parts of the same body.

Lecture XII.

therefore, the word sapinda occurs, it should be understood to include those persons who are connected together directly or indirectly by parts of the same body.

The rule of obitual impurity among sapindas does not extend to the maternal family.

"It may be objected that if this explanation of the word sapinda be accepted as correct, the rule 'among *sapindas*, the obitual impurity is prescribed for ten days,'[1] would apply to the maternal grandfather and other members of his family. The objection would have been valid had not another text—'others (husband's kinsmen) should be affected by it in the case of married women'[2] (maternal kinsmen are affected by impurity for three days only)—especially excepted the maternal kinsmen from the operation of the rule mentioned above. And so (it should be distinctly understood that) if the expression 'among sapindas' be not accompanied by any restrictive clause, the rule regarding obitual impurity for ten days should apply in all cases.

"And *sapinda*-relationship should certainly be described as based upon the connection of the parts of the same body. For the Veda says, 'Self was begotten of self.' Again, 'Be born in your son.' Apastamba says, 'It can be ocularly demonstrated that he himself is the individual who is born.' We are told also in the *Garbha Upanishad*, 'The human body is made up of six layers—three from the father, and three from the mother. Bones, tendons, and brain substance are from the father ; cuticle, muscles,

[1] Manu, V, 59.

[2] Vasishtha, IV.

and blood are from the mother.' This establishes the fact that a connection exists between different individuals through parts of the same body.

LECTURE XII.

"If sapinda-relationship be alleged to be founded upon the connection arising from the presentation of exequial cakes, then no such relationship is possible with relatives connected through the mother in the mother's line; nor with the sons of brothers and others. (If you take the word sapinda in its secondary sense of 'kinsmen' in general, then you must abandon its etymological signification, which, you maintain, is conveyed by the component parts of the word—*sa*, same, and *pinda*, oblation; for a word can never be taken in its etymological and secondary sense at one and the same time; if you take the one you must reject the other).[1]

Various meanings of the term *sapinda*.

"We will show (in our explanations of the next verse) how if the sapinda-relationship be defined to be based upon the connection of the parts of the same body, the definition will not be found to be too wide—(we will show how this definition will not imply too much, nor include too many individuals; how the fault of extreme extension or illimitableness will be avoided in practice)."[2]

Definition already given too wide.

The Mitakshara then explains the following words

[1] "An accepted sense being once admitted excludes the derivative sense. Nor should it be said that here should be admitted a secondary sense without losing the literal signification, for that cannot be received unless there be some objection to the obvious meaning." 2 Cole. Dig., 12.

[2] Mitakshara, I, 52.

in the next verse of Yajnavalkya, "beyond the fifth and seventh degrees on the mother's side and the father's side respectively."[1]

"It has been already explained, that the relation of *sapinda* exists by reason of the connection of the parts of the same body, both directly and indirectly. But such a relationship is possible everywhere, in some way or other, between all men in this wide, wide world without a beginning. So the definition would be too wide. It is for this reason that the sage limits it thus, 'Beyond the fifth,' &c.

"The meaning is '*on the mother's side*,' *i.e.*, in the line of the mother, *after the fifth degree*: '*on the father's side*,' *i.e.*, in the line of the father, *after the seventh degree*, the relation of sapinda ceases.

Limitation to a certain fixed number.

"Although the word sapinda, therefore, may be applied in its etymological sense almost to all men, it is, there can be no doubt, limited in its signification to certain definite individuals; just as the word mud-born is applied only to a lotus.

Enumeration made until the seventh degree.

"Thus the father and the other ascendants are six sapindas; and the son and the other descendants are six; and the man himself is the seventh. In case of the division of a line also, the enumeration should be made until the seventh degree, commencing from whence the direction of the line changes. This rule should be applied in every case.

How a girl's relationship with a

"A girl is said to be related to a given person in

[1] I, 53.

the fifth degree through his mother, if, in reckoning upwards from the mother to the common stock (*e.g.*, the maternal grandfather, great grandfather, and the rest), she is found to stand in the fifth degree of kindred to the common ancestor in the mother's line. Similarly, a girl is said to be related to a given person in the seventh degree through his father, if, in reckoning upwards from the father to the common stock (*e.g.*, the paternal grandfather and the rest), she is found to stand in the seventh degree of kindred to the common ancestor in the father's line."

given person is reckoned.

Summary of Vijnanesvara's views as to sapinda-relationship.

In the passages quoted above, Vijnanesvara has stated his views as to what constitutes sapinda-relationship. He abandoned the doctrine that the right to offer funeral oblations alone constituted *sapindaship*, and adopted in lieu of it the theory that *sapindaship* is based upon community of corporal particles, or in other words, upon consanguinity.[1] Vijnanesvara could not bear the idea that the sapinda-relationship should be based upon the right to present exequial cakes. If it should be made to depend upon the presentation of funeral oblations, the definition would, according to him, exclude many kinsmen who are universally acknowledged to be in the line of sapindas both in the paternal and the maternal lines. Who would venture to assert, he argues, that the brother's grandson is *not* a sapinda? He is recognized as a sapinda by common consent.

[1] Lallubhai Bapubhai *v.* Mankuvarbai, Ind. Law Rep., 2 Bomb., 423.

LECTURE XII.

Should you concede this, you cannot bring him in as a sapinda if you persist in maintaining that the right to offer funeral oblations alone constitutes sapindaship. Does the grandson of the brother ever present an exequial *parvana* cake to the *deceased?* Clearly then the doctrine that those alone are *sapindas* who present exequial cakes to the deceased is wrong. As a principle of classification, your doctrine is utterly worthless. Your definition is neither exhaustive nor suggestive. It excludes those whom it ought to include, and it includes those whom it ought to exclude. The remarks I have made with regard to kinsmen on the father's side, apply equally to kinsmen on the mother's side. Your theory then must be abandoned, and you must unconditionally accept the theory that the sapinda-relationship is constituted by community of corporal particles alone, and nothing else.

We should remark by the way that at the time of Vijnanesvara, the theory of the Bengal School that sapinda-relationship is constituted not only by direct presentation of exequial cakes, but also by participation in oblations offered (as well as by the moral obligation to present exequial cakes) to common ancestors, had not yet been perfected. The advocates of the oblation-theory at the time of Vijnanesvara must have simply maintained that the relation of sapinda exists only between the immediate giver and the immediate recipient of funeral oblations. They were evidently not unanimous in holding that this relationship

exists *also* between those who are bound to present the oblations to a common ancestor. It was reserved for Jimutavahana and his immediate predecessors, long after Vijnanesvara flourished, to propound the theory that "the man who gives the oblations, the man who receives them, and the man who participates in them are *sapindas* of each other." We are aware that Medhatithi speaks also of those kinsmen as *sapindas* who present oblations to common ancestors; but his theory evidently did not command universal assent at the time of Vijnanesvara.

Be that as it may, all blood relations are sapindas, says Vijnanesvara, and takes his stand upon this ground. This is the view he maintained in the chapter on Marriage, and he repeated the same statement in the chapter on exequial rites which follows it. The limits he proposes of the sapinda-relationship on the paternal side are the *same* in the chapter on Marriage,[1] in the chapter on S'ráddha,[2] in the chapter on Inheritance,[3] and in the chapter on Impurity.[4] The text of Manu,[5] which limits sapindaship to seven degrees only in the paternal line, is quoted by Vijnanesvara in support of his own statement to the same effect, both in the chapter on Inheritance and in that on S'ráddha. He must be bold indeed who should go so far as to say that the text of Manu referred to is taken in one sense in the chapter on

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[1] I, 53. [2] I, 253. [3] II, 137. [4] III, 18. [5] V, 60.

LECTURE XII.

Exequial Rites, and is taken in *another* sense in the chapter on Inheritance. The same text and the same words in the same text *cannot* by the rules of construction be taken in two different senses in two different places. "*Wherever*," says Vijnanesvara, "the word 'sapinda' may be used, it must always be taken in the sense of a blood relation." The author of the Mitakshara has consistently followed his own theory, and in the four chapters in which he has any occasion to use the word sapinda, he uses it without any qualification. In the chapter on Impurity it was necessary to slightly qualify the definition in the case of unmarried females, and in the case of maternal kinsmen. We have seen that in the case of the latter he has restricted the operation of the general definition. In the case of unmarried females, he is careful to propose a further limitation in the chapter on Impurity.[1] Wherever then it was necessary to qualify the word *sapinda*, he has carefully done so with the greatest precision. In the chapter on Inheritance, he uses the word *sapinda* without any qualification whatever. The conclusion is natural that he did not intend to make any qualification.

In the chapter on Inheritance again, he authoritatively lays it down that the principle of propinquity should be the "governing principle" in determining the *order* of succession. Then again the author of the Mitakshara, in discussing the question whether

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[1] III, 24.

or not the mother should be preferred to the father as an heir, says :—" Besides, the father is a common parent to other sons, but the mother is not so, and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text, 'to the nearest sapinda the inheritance next belongs.'" "Here it is evident that the word *sapinda* occurring in the quoted text of Manu has been used not in the sense of 'connection by funeral cake,' but of 'connection of particles of one body.'"[1]

LECTURE XII.

We have seen also that both Visesvara Bhatta and Balam Bhatta base the principle of propinquity upon community of corporal particles.

"It is the opinion of Vijnanesvara, of the author of Madana Parijata, and others," says Kamalakara in his Nirnaya Sindhu,[2] "that the sapinda relationship is constituted by community of corporal particles." The author of Madana Parijata was Visvesvara Bhatta, the celebrated scholiast of the Mitakshara. He has, in his original treatise, refuted at great length the doctrine of those who maintain that sapindaship is founded upon the right to present exequial cakes.

Remarks made by Visvesvara Bhatta.

"We would ask those," he says, "who would maintain that *sapinda*ship depends upon the right to present exequial cakes, which of the two principles of generalisation is preferable — that which is

[1] Umaid Bahadur *v.* Udoi Chand, Ind. Law Rep., 6 Calc., 119.
[2] Lucknow Edn., p. 234.

LECTURE XII. simple, or that which is complex. To comprehend all the facts which are the subject of classification, you have to enunciate three or four subsidiary principles before your theory of sapindaship can be applied to a given number of facts. You have to admit the male descendants by the help of one principle, the ascendants by a second principle, and the collateral kinsmen by a third principle. According to your theory, those persons are sapindas who give pindas directly to the deceased, who receive pindas from the deceased, and those who give pindas to a common ancestor. To include the three generations of ancestors beyond the great grandfather again, and the collateral kinsmen beyond the third degree, you have to introduce another principle to admit the persons who partake of the wipings of pindas. With the help even of all those subsidiary principles you are unable to include in your definition the wife of the oblator. You are obliged to admit per force in her case, as well as in the case of the wives of brothers, that they are sapindas by reason of their being 'the generator of one body (the son).' Of what use is that definition then which cannot limit, settle, and specify the exact compass of the properties common to a class. You must, therefore, abandon your theory, which is worthless for the purposes of classification, and accept without reservation the principle we propound. What we say is proper and reasonable. Sapinda-

ship is constituted by community of corporal particles." Lecture XII.

I have given you the substance of Visvesvara's remarks upon this subject. After refuting the opposite doctrine at length, and defining sapindaship with great elaborateness, he proceeds to say in the chapter on Inheritance, that "sapindas are heirs, and among them the propinquous sapindas are preferred to those who are more remote. One can be a propinquous sapinda of another by the connection of the body alone."

Visvesvara thus expressly connects the word sapinda in the chapter on Inheritance with the same word which is so elaborately defined in the chapter on Marriage.

Nilakantha, the founder of the Maharashtra School, in his Sanskara Mayukha treating of the sixteen initiatory ceremonies, in speaking of the sapinda-relationship, says: — "Vijnanesvara and others have abandoned the theory of connection through the rice-ball offering, and accepted the theory of transmission of constituent atoms. The father's constituent atoms, *viz.*, blood, fat, &c., directly enter into the body of the son; and the constituent atoms of the paternal grandfather enter the son's body through the medium of the father. In the same manner with reference to the constituent atoms of the paternal great grandfather, &c., the transmission of them somehow mediately exists. So with the mother, &c.; also, so the wife has Nilkantha.

LECTURE XII.

sapindaship with the husband, because they are the generators of one body. In this way somehow sapindaship in other cases also should be inferred."[1]

The term sapinda includes blood relations within seven degrees of ascent and descent on the paternal side.

It is a well-known rule of construction in Sanskrit that a word employed in one sense in one place should be used in the same sense in other parts of the same treatise, unless the contrary is expressly indicated. Vijnanesvara distinctly says that whereever the word *sapindaship* is met with, it should be taken in the sense of consanguinity. Even if he had not said so, we should be justified in taking the word in that sense in the chapter on Inheritance, which follows the chapter on Marriage ; because no other meaning of the word "sapindaship" is expressly given in that chapter. In the chapter on Impurity, the word sapinda has been slightly qualified ; it is proper, therefore, to take the word in that qualified sense in the chapter on Impurity. In all other places the word sapinda must be taken to mean blood-relations within seven degrees of ascent and descent on the paternal side ; and within five degrees on the maternal side.

The relationship does not rest on different basis for the purposes of inheritance & performance of ceremonies.

It has been contended that in the extracts given above, Vijnanesvara and Nilakantha deal with sapinda-relationship in its ceremonial aspect only, and that, "when they wrote upon sapinda-relationship with reference to inheritance, they may be regarded as viewing sapinda-relationship in the

[1] Ind. Law Rep., 2 Bomb., 426.

same light as the author of the Dayabhaga and certain other commentators on Hindu Law. But we think, says the Bombay High Court in the case of *Lallu Bhai Bapubhai* v. *Mankuvarbai*,[1] "that the burden rests upon the plaintiffs to show that Vijnanesvara and Nilakantha regarded sapinda-relationship as resting on a different basis for the purpose of inheritance from that on which, dogmatically perhaps, but most distinctly, the one has placed it in *Achara Kanda*, and the other in the Sanskara Mayukha. We do not think that the learned counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

"The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is, generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional. If Vijnanesvara and Nilakantha contemplated such a distinction between sapindaship for the purpose of inheritance, and sapindaship with respect to marriage and ceremonial or religious purposes, we certainly believe that they would have expressly said so."

It should also be borne in mind that Manu's definition of sapindaship is given in the chapter on Impurity.[2] Vijnanesvara quotes, and makes use of this definition in the chapter on S'ráddha, and

[1] Ind. Law Rep., 2 Bomb., 427.
[2] V, 60.

LECTURE XII.

also in the chapter on Inheritance. In the chapter on *S'ráddha* a connection is expressly established between sapindaship for the purpose of *s'ráddha* rites, and sapindaship with respect to marriage. "Sapinda-relationship," to use his own words, "is never by connection of the offering of exequial cakes, but is always by the community of corporal particles."

Conclusion as to Vijnanesvara's meaning of sapinda.

The conclusion is irresistible from all this, that according to Vijnanesvara those alone are sapindas who are connected by blood.

Medhatithi on sapindas.

Medhatithi, who, according to the author of the Mitakshara, has 'no compeer,'[1] thus explains the oft-quoted text of Manu, which defines the sapinda-relationship :

Seven generations of the same family.

"The etymological signification of the word sapinda, and the context which connects it with the word 'kindred' (bandhava),[2] make it plain that sapindas are seven generations of persons born in the same family. It is true that *pindas* are directly given to the immediate ancestors alone ; but it should be remembered that the canons of exequial rites ordain that the oblator, whose immediate ancestors are alive, is *entitled* to present the cakes to remote ancestors to whom his father, grandfather, and great grandfather were bound to offer them. Thus six generations of persons are potential sapindas.

"The man himself is the seventh. Wherefore, the ancestors, (the father), the grandfather, and

[1] I, 7,13. [2] V, 58.

the great grandfather, &c., are six sapindas ; and the son and other descendants are also six. They are recognized as sapindas on account of their connexion with the offering of the same exequial cakes. The act of presenting these cakes is performed by the descendants alone. The ancestors then to whom the oblations are presented, and the collateral kinsmen who offer the *pindas* to common ancestors, are sapindas of the oblator. The purport is this. The great grandfather of the great grandfather and his descendants to the seventh degree are sapindas. So in one's own line, as well as in those of his father and other ancestors. The enumeration should always be made until the seventh degree, commencing from whence the divergence of a line takes place. Those are sapindas, for example, who have a common grandfather. Seven degrees from him, taking him as the first degree, are sapindas. Thus the degrees of sapinda-relationship are to be counted in every other instance.

Sapinda-relationship ends with the seventh degree.

"It is settled then that six generations are sapindas, and the seventh generation is the limit of this relationship. It ends with the seventh degree. The relation of *samanodakas* ends only when their births and family names are no longer known. The birth of a man is known if it can be ascertained that 'such a person is born in our family.' His family name is known if his descent can be traced to some well-ascertained person belonging to the general

LECTURE XII.

family; if it can be known in fact that 'he is from him (that A is descended from B).'"[1]

Medhatithi's theory departed from by the author of the Mitakshara.

This is the view of the "incomparable" Medhatithi with regard to the much-contested sapinda-relationship. Medhatithi, you know, preceded Vijnanesvara by at least a century. A century before the Mitakshara, then, the doctrine of oblations with reference to sapindaship was in full force. The Mitakshara deviated from this doctrine, and established the doctrine of consanguinity.

Compromise between their systems effected by the followers of the Mitakshara.

The followers of the Mitakshara intended to effect, and have succeeded to a certain extent in effecting, a compromise between the two systems. They admitted both the doctrines as principles of classification. These, according to them, are parallel doctrines, and are not excluded by each other. The doctrine of benefits is not opposed in any way, to the doctrine of consanguinity. On the contrary, the doctrine of benefits materially assists the other in defining its exact extent. Apararka, the great jurist of the royal house of Silahara, who followed Vijnanesvara as a scholiast of Yajnavalkya, has applied the principle of propinquity founded on the connection by exequial cakes in determining the order of succession among *gotraja* heirs. The remarks of Apararka on this subject are very valuable; they "serve to elucidate the meaning of Vijnanes-

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[1] जन्म—अयमस्मत्कुले जात इति. नाम—अमुष्मादयमिति

vara's language by what may be regarded as an almost contemporary exposition."[1] LECTURE XII.

Smriti Chandrika.

That sapinda-relationship is of two descriptions has been fully brought out by the author of Smriti Chandrika in the case of an adopted son.[2] Devananda Bhatta distinctly says, that the sapinda-relationship is either by connection of the body, or by connection of exequial cakes. Madhavacharya, "the forest of learning," says in his celebrated commentary on Parasara Smriti,[3] that "the sapinda-relationship is founded on the connection by exequial cakes." Others, however, describe it differently. According to them, "those alone are sapindas who are connected by the parts of the same body. That girl is unrelated as a *sapinda* in whom these two descriptions of sapindaship do not exist. She can be married."

Nanda Pandita.

Nanda Pandita, the well-known author of a commentary on Vishnu, and of Dattaka Mimansa, says, that the "relation of sapindas is of two descriptions—through connection of the body, as also through connection of exequial cakes."[4] This is from Dattaka Mimansa. The author has maintained the same views in his commentary on Vishnu, and has

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[1] West & Bühler's Digest, Pref.

[2] Dattaka Chandrika, 3, 18.

[3] Book II, Section on Marriage.
तदिदं निवार्य्यं सापिण्ड्यम्। अपरे पुनरन्यथा सापिण्ड्यमाहुः। तथा हि समान एकः पिण्डो देहावयवो येषां ते सपिण्डाः। उक्तं द्विविधं सापिण्ड्यं यस्यां नास्ति सेयमसपिण्डा तामुद्वहेत्॥ Sanskrit College Library, M.S., 139.

[4] Dattaka Mimansa, 6, 32.

LECTURE XII.

applied the doctrine of oblations in determining the preferable right of heirs. The doctrines of Nanda Pandita assimilate more with the doctrines of the Eastern School of Hindu law than with those of the Benares School. He is acknowledged, however, as a recognized text-writer of the Western School. His opinions carry great weight in that school; and his treatise on adoption is the standard treatise on this subject in the Benares School. You know from the extract I have given you from his treatise on adoption, that his opinion is, that the sapinda-relationship is of two descriptions—that by consanguinity, and that by connection of exequial cakes. I will tell you now what he says on this subject in his Kesava Vaijayanti, or Commentary on Vishnu.

In discussing the prohibited degrees of marriage, he remarks: "Those whose body is the same are sapindas. The relation of sapindas is sapindaship."[1] Now let us see what he has to say with regard to this relationship in the chapter on Inheritance. "*Sapindah* or *samanapindah* are those who are related by the act of offering an exequial cake. Those alone are entitled to inherit who are connected by the act of offering an exequial cake."[2]

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[1] पिण्डो देहः समानो येषां तेषां भावः सपिण्डता (Commentary on Vishnu, Sanskrit College Library MS., p. 200).

[2] सपिण्डाः समानपिण्डा एकपिण्डदानक्रियान्वयिनो भवन्ति। येषामेकपिण्डदानक्रियान्वयः तेषामेव दायसम्बन्धः। (Commentary on Vishnu, Sanskrit College Library MS., p. 157).

It is manifest from the three extracts I have given you, that, according to Nanda Pandita, the sapinda-relationship is primarily founded on consanguinity, but for the purposes of determining the order of succession among heirs, the help of the doctrine of oblations should be taken in measuring the different degrees of propinquity of the heirs. The very fact of Nanda Pandita, an esteemed text-writer of the Benares School, insisting on the application of the doctrine of oblations in defining heritable right, clearly proves that the lawyers of the Benares School inseparably connect the principle of consanguinity with the doctrine of oblations, and by the mutual help of these doctrines, they settle all disputed questions of inheritance. The doctrine of oblations, so far as it goes, furnishes a crucial test of consanguinity. LECTURE XII.

Kamalakara, the author of Vivada Tandava, has entered into great length in his celebrated work on Ceremonial Law, called Nirnaya Sindhu, in defining the sapinda-relationship. I will give you the substance of his remarks. These will show you the different aspects of the question under discussion. The authority of Kamalakara is respected not only in the Benares School, but also in the Maharashtra School. This is what he says: Kamalakara.

" He shall marry a girl who is not a sapinda.

" *Not a sapinda*, *i.e.*, devoid of the sapinda relationship; and this (relationship) exists by connection of the parts of the same body. Parts of the father's

Lecture XII.

or mother's body are directly or indirectly interwoven with and changed into blood and bones in the bodies of the son and the grandson, and others. Although sapinda-relationship in this sense is not possible between husband and wife, and mutually between the wives of brothers, yet the connection of parts of the same body does exist through a common repository (the son, etc.). The particles of the father's body are blended with those of the mother in the sons. This is the opinion of the author of Madana Parijata, Vijnanesvara, and others. Vachaspati Misra and the author of Suddhi Vibeka, as well as Sulapani and other teachers of the Gaura (Bengal) and Mithila Schools, are also of the same opinion.

"The author of the Chandrika, Apararka, Medhatithi, Madhava, and others, however, hold a different opinion. According to them 'sapinda-relationship exists by reason of the connection arising from the offering of common funeral oblations.' For the Matsyapurana says: 'The fourth ancestor and others are sharers of divided oblations; the father and others are sharers of the undivided cake. The seventh is the giver of oblations to them. The sapinda-relationship, therefore, extends to the seventh generation.'

"It must not be supposed that this relationship does not exist between a given person and his paternal uncles, &c. Inasmuch as both the deceased and his uncles, presented oblations to a common ancestor, the sapinda-relationship, therefore, subsists between them.

If any one of the common ancestors receive oblations from several individuals, all such individuals are bound together by ties of sapinda-relationship, or in other words, the sapinda-relationship does always subsist between those who present oblations to a common ancestor.

"It must not be supposed again that this relationship did not exist between the deceased and his maternal uncle, &c. For, both the deceased and his maternal uncle presented oblations to a common ancestor, *viz.*, the maternal grandfather. Nay there is sapinda-relationship between the spiritual guide and his disciple, for they are competent to present these oblations to each other. It is needless to expatiate. There is sapinda connection even between the king and his subjects, inasmuch as the king performs the s'ráddha ceremonies in honor of his deceased subjects. For, the Markandeya Purana says, 'On failure of *all* relatives, the king shall cause funeral oblations to be presented to the deceased, meeting the expenses from the funds of the deceased.'

"Those that affirm that sapinda-relationship is based upon community of corporal particles are obliged to limit its range, and to restrict it to a certain fixed number of individuals. The holders of the opposite doctrine also are obliged to make a similar restriction.

"It thus follows that the father and other ancestors are six sapindas; and the son and other descendants are six sapindas.

Lecture XII.

"The enumeration of sapindas should always be made from the common ancestor. For it is said, 'If the father of the bride or bridegroom is seventh from the common ancestor, and their mother is fifth from him, there is no sapinda relationship between them.' *Common ancestor* means the common progenitor—the root as it were from whom the different lines have branched off. We read in the treatise of Visvarupa, 'In this way, in the manner described above, marriage is allowed between those alone who are beyond the seventh among father's bandhus, and beyond the fifth among mother's bandhus. The wise make the enumeration in both lines—commencing from whence the lines diverge—until the bridegroom in one line and the bride in the other are reached.'[1]

Dharma Sindhu, the latest work of the Benares School.

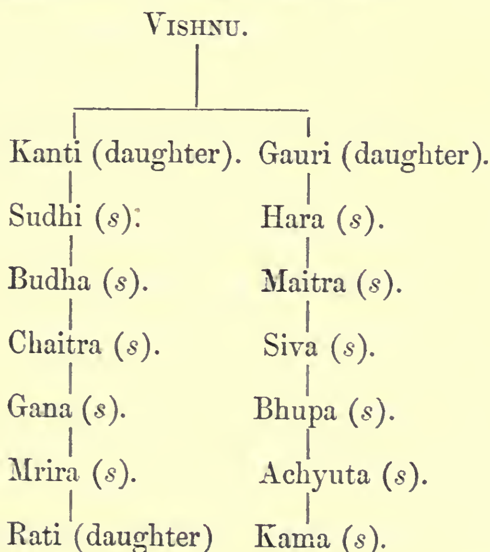
"We will close our historical inquiry with regard to the development of the sapinda-relationship with an extract from Dharma Sindhu of Kasinatha, the latest writer of the Benares School:

"She is a sapinda who is connected by the act of offering exequial cakes—*or*, who has (the particles of) the body of a common ancestor. According to some then sapinda-relationship depends upon connection arising from the offering of exequial cakes. According to others again this relationship exists by reason of the connection of the parts of the body of a common ancestor. In a question of sapinda-relation-

[1] Nirnaya Sindhu, Lucknow Edition, p. 234.

ship on the side of paternal kinsmen, the rule is that it ceases beyond the seventh degree ; but on the side of maternal kinsmen, the rule is that it ceases beyond the fifth degree. Here are a few illustrations :—

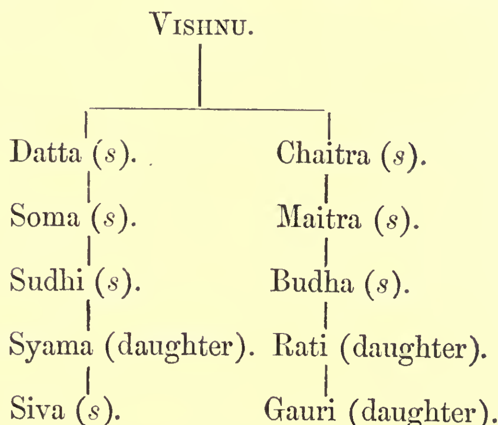
1. "Suppose Kanti and Gauri are two daughters of Vishnu. Kanti has a son, Sudhi, and Gauri has a son, Hara. Budha, Chaitra, Gana, and Mrira are the son, grandson, great grandson, and great great grandson of Sudhi; and Maitra, Siva, Bhupa, and Achyuta are the son, grandson, great grandson, and great great grandson of Hara; Rati is a daughter of Mrira, and Kama is a son of Achyuta. Both of them are eighth in descent from the common paternal ancestor Vishnu; Rati and Kama, therefore, can marry each other.



"Here Rati and Kama are not within prohibited degrees of marriage.

LECTURE XII.

2. "Suppose again, Datta, Soma, and Sudhi are the son, grandson, and great grandson; and Chaitra, Maitra, and Budha are the son, grandson, and great grandson, of a common ancestor Vishnu. Syama and Rati are the daughters of Sudhi and Budha respectively. Siva is Syama's son, and Gauri is the daughter of Rati.



"Siva and Gauri, being both of them sixth in descent from the common maternal ancestor Vishnu, are not within prohibited degrees of marriage, and may, therefore, marry each other.

"In the mother's line, it should be remembered, the sapinda-relationship reaches to the fifth degree only."

Definition of sapinda forms the hinge on which turns the Law of Inheritance.

I am afraid I cannot pursue the subject of the development of the sapinda-relationship any further. I have already exceeded my space. The few rough notes I have given you, however, may show you the direction in which the inquiry is to be carried. The subject is of great importance to a historical

student of Hindu law. The whole Hindu Law of Inheritance hinges in fact on a correct definition of the sapinda-relationship. It cannot be correctly defined, unless we know what was the juridical value of it before Vijnanesvara, and in what light it was viewed after this great jurist. If we know how the lawyers before Vijnanesvara estimated sapindaship, we can easily perceive the point of deviation of the Mitakshara from the principles of his predecessors. Medhatithi and Apararka give us an insight into the opinion that was held regarding the sapinda-relationship during the ages immediately preceding and following the age of Vijnanesvara. Devananda, Madhava, Kamalakara, Nanda Pandita, and Kasinatha show us the different stages of development of opinion regarding this relationship, after Apararka; you have thus before you the history of the development of this relationship from the tenth to the end of the seventeenth century.

The question whether sapinda-relationship is based upon community of corporal particles, or on the connection derived from the capacity of making funeral oblations, has been warmly discussed by modern jurists. The High Courts of Calcutta and Bombay, and the Privy Council, have unanimously arrived at the conclusion, after a careful and elaborate examination of the original authorities, that according to the law of the Mitakshara, the heritable right among sapindas must be determined by blood-relationship

LECTURE XII.

or the community of corporal particles, and not by the capacity of presenting funeral oblations to the *pitris*. Sapinda-relationship, according to them, should be based upon community of corporal particles, and not upon the right to offer funeral cakes. Sapindas are kinsmen connected by ties of consanguinity alone. Sapindas, as a rule, are capable of performing funeral rites, but it does not necessarily follow that those who perform the exequial ceremonies must also be sapindas. These are not convertible terms.[1]

Mitakshara's definition of *daya* or heritage. Inheritance by reason of relation to the owner.

Before I conclude this part of the subject, I would draw your attention to the text of the Mitakshara, which declares that "the term 'heritage' (*daya*) signifies that wealth which becomes the property of another *solely by reason of relation to the owner.*" This text is the key to the theory of inheritance propounded by Vijnanesvara in his Mitakshara. "The relation to the owner" alone determines the right to succession. It is the 'sole' cause of inheriting the property of another. While the Dayabhaga of Jimutavahana lays it down as the general rule that "inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit;" the Mitakshara emphatically declares that "inheritance is solely in right of relation to the

Order of succession regulated by propinquity.

[1] Lallubhai Bapu Bhai, Ind. Law Reports, 2 Bom., 388; Umed Bahadur, Ind. Law Rep., 6 Calc., 119; Ind. Law Rep., 5 Bom., 110; Amrit Kumari, 10 Weekly Reporter, 76.

owner, and the order of the succession is regulated by the degree of nearness of relation to the owner."[1] In order that there may be no misunderstanding on this subject, Vijnanesvara lays it down as an axiomatic truth at the very outset of his disquisition on inheritance. He apparently takes it as an axiom upon which the law of inheritance is founded, "The relation to the owner is the very cornerstone of the law of succession." Not satisfied by generally laying down this axiom, he thus explains it:

LECTURE XII.

Inchoate rights.

"The wealth of the father, or of the paternal grandfather, becomes the property of his sons or of his grandsons, *in right of their being his sons or grandsons*, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner, if there be no male issue: and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor *in right of his being uncle or brother*. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other (descendants)."[2]

These remarks fully explain the axiom laid down by Vijnanesvara that "inheritance is solely by reason of relation to the owner." Sons and grandsons, brothers and uncles, and their descendants, inherit the property of the deceased owner "solely

[1] Chapter I, 1, 2; II, 3, 4.

[2] Mitakshara, I, 1, 3.

LECTURE XII.

in right of their being his sons and grandsons, brothers, and uncles." In other words, the kinsmen of the deceased owner are entitled to succeed to his property solely by reason of their consanguinity with the deceased proprietor. They are connected with him by blood, and this blood relationship determines their heritable right. That this is the meaning of Vijnanesvara's words is confirmed by Visvesvara Bhatta and Balam Bhatta, two eminent commentators of the Mitakshara:

Visvesvara Bhatta on heritage.

"Wealth," says Visvesvara Bhatta in his Subodhini, "which becomes the property of another (as a son or other person bearing relation) in right of the relation of offspring and parent and the like, which he bears to his father or other relative who is owner of that wealth, is signified by the term heritage. A son and a grandson have property in the wealth of a father and of a paternal grandfather, without supposition of any other cause but themselves."[1]

Ballam Bhatta.

By the word 'solely,' according to Balam Bhatta, the author of the Mitakshara, "excludes any other cause, such as purchase and the like. *Relation*, or the relative condition of parent and offspring, and so forth, must be understood of that other person, a son or kinsman, with reference to the owner of the wealth."[2]

This will show that, according to Visvesvara Bhatta and Balam Bhatta, "the relation to the owner"

[1] Mitakshara, I, 1, 2, 3, note. [2] *Ibid*, I, 1, 2, note.

does not mean any other relation save the connection by community of corporal particles. The Mitakshara does not even remotely refer by this 'relation' to connection by the exequial cake. The connection by the exequial cake furnishes, so far as it goes, a test or evidence of the 'relation' which is the cause of inheritance, but must not be confounded with the cause itself. There are cases where the connection by the exequial cake gives no help whatever in determining the heir. "The relation to the owner" alone then determines the heritable right, and must be considered as the key of the law of inheritance. The principle of oblations is of material help in determining the order of succession, but it must be clearly understood, that consanguineous relation alone is the sole cause of the heritable right. Between two persons claiming as heirs, or between two classes of heirs, *the question of preference* is settled by the principle of benefits. It is simply a principle of selection founded on superior efficacy of oblations, and is applicable only to the solution of a question of precedence. It does not determine the *heritable* right, but settles the *preferable* right of an heir. "When there are many claimants to the heritage," says the Viramitrodaya, "among *gotrajas* and other classes of heirs, the benefit conferred on the late owner by the offering of the cake and the water determines the title to preference; but it can never create the right to inherit."[1]

[1] Viramitrodaya, II, 1, 23*a*.

LECTURE XII.

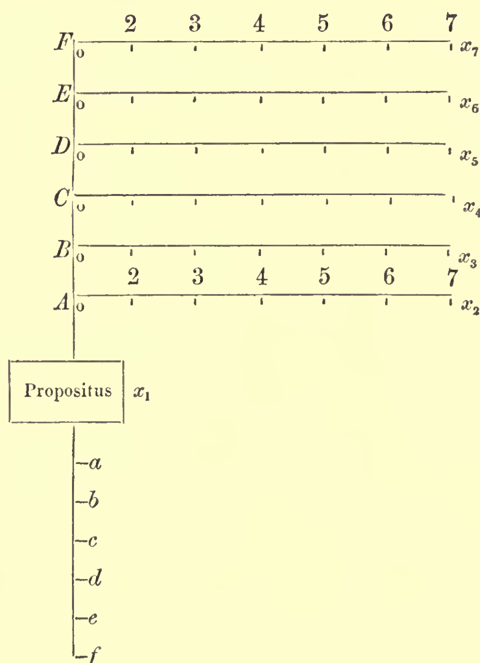
Persons falling within the range of sapinda-relationship.

It being settled then that the sapinda-relationship is founded upon "community of corporal particles," it is easy now to determine, from the rules and illustrations given by the Mitakshara, the persons who properly come within the range of this relationship.

The limits of the sapinda-relationship then include seven degrees, six in ascent and six in descent, from the Propositus in the male line. In the collateral branches also, the limits of the relationship include six degrees in descent from a common ancestor.

Tabular sketch.

The following table of sapinda-relationship in the male line will make this clear:



In this table, *a*, *b*, *c* are the son, grandson, and the great grandson of the deceased proprietor; and *d*, *e*, *f* are the son, grandson, and the great grandson of the great grandson of the deceased. In this line *a*, *b*, *c*, *d*, *e*, *f* are all descended from the Propositus. All of them, therefore, are the sapindas of the deceased in the descending line.

Explanations. Descendants.

In the ascending line, *A*, *B*, *C* are the father, grandfather, and the great grandfather of the deceased; and *D*, *E*, *F* are the father, grandfather, and the great grandfather of the great grandfather of the deceased. All these six ancestors of the deceased are his sapindas. The small circles which you see under the collateral branches, alongside *A*, *B*, *C*, &c., are the mother, grandmother, great grandmother, and the other female lineal ancestors of the deceased. These also are his sapindas.

Ascendants.

In the collateral branches, 2, 3, 4, 5, 6, 7 represent six degrees in descent from *A*, *B*, *C*, &c. There are six collateral lines branching off from the six ancestors. In each line there are six descendants. All these thirty-six descendants, then, of common ancestors are sapinda-kinsmen of the deceased.

Collaterals.

For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon downwards from the common stock to the collateral relative, allowing a degree to each person. Thus, to take the example

Degree of relationship how ascertained between collaterals.

LECTURE XII.

given by the Mitakshara, x_2 stands in the seventh degree of kindred to the deceased, being sixth in descent from the common ancestor *A;* so with x_3, x_4, x_5, x_6, x_7.

You should always remember that the propositus himself counts as the first degree in reckoning lineally upwards and downwards. With regard to collateral relatives, each of the common ancestors becomes an independent stock, and counts as the first degree with reference to his own particular line. Thus *A*, the father of the deceased, counts as the first degree with reference to the brother, nephew, &c., of the deceased. The father being in the first degree, the brother will be in the second degree, the nephew in the third, and so on to the seventh. The uncle, similarly, will be in the second degree, because the grandfather counts as the first degree.

Sagotra sapindas.

These are all *sagotra* sapindas, or sapindas bearing the same family name.

Mode of computing degrees of relationship among *bandhus.*

While on this subject, I may also tell you that, with regard to *bandhus* or sapindas who belong to a different gotra, the mode of computing the degrees of kindred is slightly different from that used in calculating the degrees of the *gotraja* relationship. It should be borne in mind that, in the case of *bandhus*, the limit of the sapinda-relationship extends to five degrees only.

LECTURE XII.

The following table will make this clear :—

C	2	3	4	5	x_5
B	2	3	4	5	x_4
A	2	3	4	5	x_3
m					
Propositus	x_1				

In this table *m* represents the mother of the propositus. *A*, *B*, *C* are the maternal grandfather, great grandfather, and the great great grandfather of the deceased. In the collateral branches, 2, 3, 4, 5 in each line are the descendants of each of the common ancestors *A*, *B*, *C*. There are thus sixteen collateral kinsmen related through the mother, who are sapindas of the deceased.

For the purpose of ascertaining in what degree of kindred any *bandhu*, or a sapinda belonging to a different gotra, stands to the deceased, it is proper to reckon upwards from the person deceased to the *bandhu* in question, allowing a degree for each person. The deceased himself counts as the first degree. His mother is in the second degree. The maternal grandfather is in the third degree, the great grandfather is in the fourth, and the great great grandfather is in the fifth degree. The sapinda-relationship extends thus far only, and does not go beyond it.

LECTURE XII.

As in the case of *sagotra sapindas*, the Propositus himself is counted, in the language of the Mitakshara, as the 'seventh;' so, with regard to *bandhus*, the Propositus himself is counted as the 'fifth.'[1] As in the former case there are only *six* degrees of lineal sapindaship upwards, so in the case of *bandhus* there are only *four* degrees of such relationship (including the mother). The Hindu lawyers compute the degrees of sapinda kindred in a rather singular manner. In computing, in the paternal line, the degrees of lineal consanguinity upwards, the father is always the starting point; and in the maternal line, the mother is the starting point. In the father's line, you go six degrees upwards, to the great grandfather of the great grandfather of the deceased, and then come downwards again to the deceased himself as "the seventh person." The same thing is done in the mother's line. Only in this case you take the mother as the starting point, and then go upwards to the maternal great great grandfather, and then come downwards again to the deceased himself as "the fifth person."

Mother's line.

You know now the *bandhus*, in the mother's line, who claim this relationship through males. Here I should caution you against a mistake which you might fall into. In computing the

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[1] पित्रादयः षट् सपिण्डाः, तस्यैव स्वपुत्रादय षट्, आत्मा च सप्तमः। तथा मात्रादयश्चत्वारः, आत्मा च पञ्चमः।

Madana Parijata, Sanskrit College Library MS., 29.

degrees of sapindaship in the mother's line, the mother is always counted as in the second degree. All the kinsmen related *through* the mother are called *bandhus*, but the mother is *not* a *bandhu*. She is a *sagotra sapinda*, and not a sapinda belonging to a different gotra. By her marriage, she became of the same gotra as the father of the deceased. In the table above she is brought in simply to show how the maternal grandfather of the deceased is related to him in the third degree.

With regard to the computation of degrees of relationship in which collateral kinsmen related through the mother stand to the deceased, you should bear in mind, *mutatis mutandis*, the rule given by the Mitakshara: "Should the line diverge, the enumeration should be made, until the fifth degree, commencing from whence the direction of the line varies."[1] In the above table, for example, three lines diverge from the common ancestors, *A*, *B*, *C*. x_3 is in the fifth degree of sapinda kindred to the deceased. So with x_4 and x_5. The illustration given by the Mitakshara makes this point quite clear: "A collateral kinsman in the mother's line is said to be related to the deceased in the fifth degree, if in reckoning upwards from the deceased (through his mother) the said kinsman is found to stand in the fifth degree of kindred to the common ancestor." We have altered the wording of the illustration to adapt it to the case in point.[2] x_3, x_4, x_5 are

[1] Mitakshara, I, 52.

[2] *Ibid*, I. 53.

LECTURE XII.

each of them, according to this illustration, in the fifth degree of sapindaship to the deceased, being each of them in the fourth degree of descent from the common ancestors *A*, *B*, *C* respectively.

Denotation of the term *bandhu*.

The term *bandhu* applies not only to the maternal kinsmen mentioned above, but also to those kinsmen who are related through females either of the paternal or the maternal line. The daughter's son, the sister's son, the father's sister's son, the brother's daughter's son, or the uncle's daughter's son, are all *bandhus* of the paternal line. So in the maternal line, the mother's sister's son, maternal uncle's daughter's son, and maternal great grandfather's daughter's son are cognate sapindas of the deceased. All these persons belong to a different gotra, and are related by blood to the deceased. They are therefore his *bhinna-gotra sapindas*, or sapindas bearing a different family name.

All kinsmen related through females.

I will explain to you in the next Lecture the Mitakshara doctrine regarding the *bandhu* relationship.

LECTURE XIII.

ORDER OF SUCCESSION UNDER THE MITAKSHARA LAW.

I. Gotrajas.

Gotraja sapindas: order of succession among them according to the Mitakshara — Vijnanesvara's text embodying the essence of the law — His enumeration not exhaustive, but illustrative — Principle of propinquity — Propinquous sapindas of the deceased — Enunciation of the principle according to which preferable right is determined — Calculation of benefit from oblations — Sapindas in the father's line — In the grandfather's line — In the great grandfather's line — Nearer line excludes the remoter — Omission by Apararka of parents and other ancestors accounted for — Remote descendants postponed to the propinquous sapindas in the ascending line — Rule as to different classes of heirs among the sapindas succinctly stated — Heirs in the lines of 4th, 5th, and 6th ancestors — Fourteen classes of sapinda heirs in all — Do they include widow, daughter, and daughter's son? — Graphic view of the Order of Succession among them — Female gotraja sapindas not entitled to inheritance excepting such as are specifically mentioned in the Mitakshara — Two classes of gotraja females: 1. Daughters of gotrajas, whether married or unmarried, excluded from succession according to the Bombay Digest — Also according to the Maharashtra School, which, however, excepts the sister — Sister in the Maharashtra School — Balam Bhatta's exception in favor of daughter's daughter, &c. — Nanda Pandita's exceptions in favor of daughter of the father and other ancestors — The wives and widows of male gotraja-sapindas — Excluded from succession according to the Viramitrodaya — Full Bench Ruling of the Calcutta High Court denying the step-grandmother's right to succeed — Mitakshara law as accepted in Bengal does not recognize the title of the second class of gotraja females — *Gauri Sahai* v. *Rukko* — In Western India their rights co-extensive with their husbands — *Lallubhai Bapubhai* v. *Mankuvarbai* — Privy Council Ruling on the above case — Samanodakas succeed in default of gotraja-sapindas, *i.e.*, persons bearing the same family name with the deceased and descended from common progenitor — Principle of the order of succession among them the same as among the sapindas.

LECTURE XIII.

II. Bandhus.

Bandhus succeed on failure of gotraja-sapindas — They are the cognate sapindas, or sapinda relations through *a female* — Test of reciprocal sapindaship — Illustration — Mitakshara's list of bandhus not exhaustive — Three descriptions of bandhus: 1, The deceased's own; 2, his father's; 3, and his mother's — Illustration by a genealogical tree — Heritable right determined by the criterion of reciprocal sapindaship — The doctrine applicable to bandhus — Hypothetical case of a sapinda not being an heir — Bandhu is a cognate sapinda within four degrees — Construction of synoptic table — sThe tables explained and illustrated — Table I (*a*): cognate sapindas *ex parte paterna* — Five classes of bandhus in the descending line — There are seven such persons: 1, Daughter's son; 2, Daughter's son's son; 3, Son's daughter's son; 4, Son's daughter's grandson; 5, Grandson's daughter's son; 6, Daughter's daughter's son; 7, Son of the daughter of the son's daughter — No others are bandhus with rights of inheritance in the descending line — Seven heritable bandhus in the lines of each of the four immediate ancestors — Four parallel ascending lines — In the ascending and descending lines the bandhus are altogether thirty-five in number — Succession among them regulated by the law of propinquity — Illustrations of the principle — Law of gradation of three classes of bandhus for heritable purposes: (1) one's own bandhus, (2) his father's, (3) and his mother's, arranged in order of preference — Elucidation of the law with examples — Table I (*b*): cognate sapindas *ex parte materna* arranged in three parallel lines — Their order of succession slightly different from that of the previous class, though based on the spiritual principle — The way in which it is fixed — Tables II and III: father's and mother's bandhus — Two parallel lines — Order of succession the same as in Table I (*b*), or as among bandhus *ex parte materna* — In expansion of the Mitakshara's list which enumerated only nine — Effect of judicial decisions and the law of progress and evolution — Can a brother's daughter's son succeed under the Mitakshara Law — *Doorga Bibee* v. *Janaki Prasad*, *Giridhari Lal Roy* v. *The Government of Bengal*, *Umrita Kumari Debi* v. *Lakhi Narayan* — Sister's daughter's son — *Umed Bahadur* v. *Udoi Chand* — Sister's son in competition with mother's sister's son — *Ganes Chunder Roy* v. *Nilkomul Roy* — Mayne on succession among bandhus according to the Mitakshara law — Affinity determines the right, and propinquity the order of succession — Male line preferred to the female — Father's paternal aunt's son preferred to mother's brother's or her sister's son — So is also mother's paternal aunt's son — Father's maternal aunt's son and his maternal uncle's son exclude the same relations of the mother — Why are father's and mother's paternal aunt's son placed in the second and third series of heirs, their natural place being in the first? — West and Bühler on the succession of bandhus — Their conclusion erroneous — Reason of the law a safer guide than the letter.

III. The Principle of Survivorship.

LECTURE XIII.

Doctrine of survivorship enunciated by the Privy Council — Applicable to the joint property of an undivided family — But not to separate property — *Sadabart Prasad* v. *Foolbash Koer* — Devolution of separate and joint property — *Raja Ram Narain* v. *Pertum Singh* — Widow excluded by surviving members of the family — *Debi Pershad* v. *Thakur Dyal* — Predeceased brother's son succeeds along with surviving brothers by right of representation — *Bhimul Dass* v. *Choon*e *Lall* — View of the Madras High Court — Conclusions — Heirs by descent — By survivorship — When there has been a partition — Mistaken notions regarding survivorship — The survivors take *per stirpes* — Professor Goldstücker's view of the Privy Council judgment — Its incorrectness proved by authorities cited — Dharma Sindhu — Dayabhaga — Mitakshara — Madana Parijata — Viramitrodaya — Principle of survivorship a relic of the past.

I. *Gotrajas.*

WE know now who the *gotraja sapindas* are. We are, therefore, in a position to examine the doctrines of the Mitakshara relating to the order of succession among the gotraja sapindas.

Gotraja sapindas: order of succession among them according to the Mitakshara.

Vijnanesvara ordains :

"If there be not even brother's sons, gentiles share the estate. Gentiles are the paternal grandmother, and *sapindas*, and *samanodakas*. In the first place, the paternal grandmother takes the inheritance. On failure of the paternal grandmother, *sagotra sapindas*,—namely, the paternal grandfather and the rest,—inherit the estate. Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons. On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue, inherit. In like

Vijnanesvara's text embodying the essence of the law.

LECTURE XIII.

manner, up to the seventh degree, must be understood the succession of kindred known as sagotra sapindas."[1]

His enumeration not exhaustive,

I pointed out to you in a previous Lecture that there is nothing in these texts to warrant the assertion that the author of the Mitakshara gives an exhaustive enumeration of *gotraja sapindas.* What he really does is, that he indicates, in unmistakable terms, the *order* in which the gotraja sapindas are to succeed to the property of the deceased.

but illustrative.

I have also shown to you that the vexed question, whether the enumeration of gotrajas in the Mitakshara is exhaustive, or whether it is merely illustrative, has been set at rest by an uniform course of decisions. In the important case of *Thakoor Jeebnath Singh* v. *The Court of Wards,*[2] the Calcutta High Court,

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[1] Mitakshara, II, 5. 1—5.

[2] *Calcutta High Court*, 12*th July*, 1870.

Present:—SIR RICHARD COUCH, KT., *Chief Justice*, HON'BLE L. S. JACKSON, and F. A. GLOVER, *Judges*.

THAKOOR JEEBNATH SINGH (PLAINTIFF) *v.* THE COURT OF WARDS AND OTHERS (DEFENDANTS).

COUCH, C. J.—This is an appeal from the decision of the Deputy Commissioner of Lohardugga, dismissing the plaintiff's suit with costs. The suit was brought to obtain possession of the Ramghur estate as heir to Trilokenath Singh, deceased. The plaintiff is the son of the sister of Trilokenath's father, and the defendant Brum Narain is the great grandson of the great grandfather of the grandfather of Trilokenath, and the main question which has been raised in this appeal is, whether the plaintiff is, under the law contained in the Mitakshara, the heir to the deceased Trilokenath in preference to Brum Narain, it being assumed that by the custom of the family, the defendant Maharanee Heeranath Koomaree, the mother of the deceased, is incapable of inheriting. The argument for the plaintiff has been rested upon the interpretation which it is con-

after reciting the texts of the Mitakshara on this subject, very justly observed: "It is urged that the author limits the inheritance to the grandsons of

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tended should be put on the 5th section of the 2nd Chapter of the Mitakshara, and it is said that in that section the author refers to the text in sec. I, verse 2 and enumerates the heirs; and that only those are gentiles (gotrajas) who came within the scheme of sec. 5, by which it is said the collateral succession is limited to the grandson of the common ancestor, the degrees being reckoned in the direct line, and on failure of these, the cognates succeed. Thus Brum Narain, who is a great grandson of the common ancestor, would be excluded, and the plaintiff, who is the nearest cognate, entitled to the inheritance.

Before noticing the decided cases upon the point, we think we had better consider the text of the Mitakshara.

In Chap. 2, sec. 1, verse 2, the rule of Yajnavalkya is given:—"The wife and the daughters also, both parents, brothers likewise and their sons, gentiles, cognates, a pupil, and fellow-student; on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all persons and classes."

In sec. 5, the author, having in the previous sections commented on the right of the wife, the daughter, and the daughter's sons, the parents, and the brothers, proceeds to comment on the succession of the gotrajas or gentiles. In the first place, the paternal grandmother takes the inheritance, and on failure of her, the paternal grandfather, the uncles and their sons. Sec. 4.

"On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue, inherit." Sec. 5.

It is urged that the author thus limits the inheritance to the grandsons of the paternal grandfather and paternal great grandfather, and that the words which follow—"In this manner up to the seventh degree must be understood the succession of kindred belonging to the same general family"—apply the same rule to the descendants of remoter ancestors. If this be the interpretation, the author of the Mitakshara does not expound the text of Yajnavalkya by stating the order in which the gotrajas or gentiles are to succeed, but he makes a different rule of succession by which some of them are altogether excluded from the inheritance, the text of Yajnavalkya being that, on failure of the gentiles, the cognates (the next in order) are to succeed. It is reasonable to suppose the author intended to state the order of succession among gotrajas rather than to introduce a different rule. And it has been suggested in the argument for the respondent that the making the enumeration in the collateral line cease at the grandsons, is explained by the offering of funeral oblations. It is argued for the respondent that as the *sapindas*

LECTURE XIII. the paternal grandfather and paternal great grandfather; and that the words which follow—'In this manner up to the seventh degree must be understood

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are of two grades, the nearer who offer and partake of pinda (the rice ball) entire, and the remoter who offer and partake of merely the wipings of the hands; the author keeping in mind the text he had before cited in sec. III, verse 3, and sec. IV, verse 5:—" To the nearest sapinda the inheritance next belongs," enumerates the sapindas in the order of propinquity, omitting the great grandsons of the father, of the paternal grandfather, and of the paternal great grandfather, because they are remoter than the kindred he mentions.

And the passage in Subodhini, translated in the note at p. 144, West and Bühler is consistent with this—It is " on failure of the father's line, the line of the father (must be understood to) end with the brothers and their sons," which may mean for the purpose of determining who are the nearest sapindas. It cannot be supposed that it was intended entirely to exclude the father's great grandson, and that the inheritance should go to another family.

That the 5th section was not intended to be an exhaustive enumeration ofthe gotrajas, but only a statement of the order in which they would take, seems to be the interpretation which is consistent with the text which was being expounded, and with the ruling principle of the Hindu Law of Inheritance, and ought to be preferred. But the question is really settled by decisions. In *Ratcheputty Dutt Jha* v. *Rajendro Narain Roy* (2 Moore's Indian Appeals, 132,) it was held, that by the Hindu law in force in Mithila, the party in possession being descended in the 6th degree in the paternal line was to be preferred to the maternal line. At the close of the judgment it is said, that the Mithila law was against the claim of any relation on the mother's side, till those on the father's side to the 7th degree have been exhausted. Some of the authorities quoted in that case—the *Vivada Chintamani* and *Vivada Chandra* for instance—do not belong to the Benares School, by the law of which the case before us is governed, but this is not a point upon which there appears to have been a difference between the Mithila and Benares Schools. In *Mussamat Dig Daye* v. *Bhuttun Lal* (11 Weekly Reporter, 500), it was held by Mr. Justice L. S. Jackson and Mr. Justice Mitter, that gentiles must be exhausted before the cognates can succeed. There are several decisions in the N. W. Provinces upon the law according to the Benares School. In *Durroo Sing* v. *Rai Singh* (Sudder Dewany Adawlut Reports, 1864, page 521), it was held that though the great grandsons of the paternal great graudfather of the last male owners are not expressly enumerated by Sir W. Macnaghten as heirs according to the law as current in Benares, yet they are entitled to inherit.

In *Ugur Singh* v. *Ram Singh* (Sudder Dewany Adawlut Reports, N. W.

the succession of the kindred belonging to the same general family'—apply the same rule to the descendants of remoter ancestors. If this be the interpretation, the author of the Mitakshara does not expound the text of Yajnavalkya by stating the order in which the gotrajas, or gentiles, are to succeed; but he makes a different rule of succession, by which some of them are altogether excluded from the inheritance; the text of Yajnavalkya being that, on failure of the gentiles, the cognates (the next in order) are to succeed.

Provinces, July, 1865, page 4), it was also held that in the tracts governed by the Benares Law, a great grandson is included among near heirs, and several previous decisions to the same effect are quoted at page 11. In that case both the claimants and the deceased appear to have been in the fifth degree from the common ancestor. There is another decision in the same Court: *Soodhyan* v. *Mohun Pandey*, (2 Sudder Dewany Adawlut Reports, N. W. Provinces, 1863, page 134).

In the Bombay Presidency, the same construction has been put on the Mitakshara, and the series has been considered by the *shastris* as not exhaustive, nor intended to exclude others than those named, but only as an exemplification of the general doctrine: (Digest of Hindu Law by West and Bühler, Book I, p. 139.) It was also recognized by the law of the Mitakshara in *Ranee Sreemutty Debea* v. *Ranee Koond Luta* (4 Moore's Indian Appeals, p. 292).

We are, therefore, clearly of opinion that the appellant is not entitled to the inheritance in preference to the respondent Brum Narain, and that the decision of the Lower Court on this point is right. As regards that part of the case which is described in the plaint, and is called in the grounds of appeal the constitution of an heir by appointment, we need only say, that, taking the evidence of Maharanee Prem Koomaree to be entirely true, there was no adoption, nor anything which would, by Hindu Law, alter the status of the plaintiff, and give him any other right of succession than he had as the father's sister's son. The question between the Maharanee and the defendant Brum Narain is the subject of another suit. As between the plaintiff and Brum Narain, the decision of the Lower Court is right, and the appeal must be dismissed with costs as against the second and third respondents, but without cost as against the first respondent, the Court of Wards. (5 B. L. R., 549.)

LECTURE XIII.

"It is reasonable to suppose the author intended to state *the order of succession* among gotrajas, rather than to introduce a different rule.

"That the 5th section was not intended to be an exhaustive enumeration of the *gotrajas*, but only a statement of the order in which they would take, seems to be the interpretation which is consistent with the text which was being expounded, and with the ruling principle of the Hindu Law of Inheritance, and ought to be preferred."

In *Bhya Ram Singh* v. *Bhya Ugur Singh*[1] the

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[1] *Privy Council, the* 28*th June*, 1870.

BHYA RAM SINGH *v.* BHYAUGUR SINGH.

[On Appeal from Sudder Dewany Adawlut, N.-W. Provinces.]

Their Lordships took time to consider; and on 28th June, 1870, Sir R. Phillimore delivered the following written judgment:—The suit out of which this appeal arose was brought in the Court of the Principal Sudder Ameen of Goruckpore by the plaintiffs as heirs, after the death of his widow, who survived him, of one Juskurun Singh, to recover certain moveable and immoveable estate, the property of the deceased at his death. It appeared that the plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor Chutter Bainee Singh.

By the pedigree it appeared that the plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his great great great grandsons. The appellants contended that the plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the widow's death, the heirs of the husband at that time alive were the legal heirs; the property claimed was at that time in the possession of the defendants under alleged alienations by the widow.

Defendants denied the plaintiffs' title. Admitting the pedigree to be correct as far as it went, and assuming, for the purpose of raising their objection to the title, all that the pedigree stated to be true, they contended by their answer, that the plaintiffs were not within the line of heirs.

The question then is reduced to this—whether the plaintiffs, being the great great great grandsons of the common ancestor, were too remote in degree to be heritable as gentiles.

question was, whether the *fifth* descendant of the *fifth* ancestor is in the line of heirs. It was held by

LECTURE XIII.

The subject is important. It is beset by difficulties raised by varying opinions, decisions, and comments on a text clear enough, if interpreted by the principles of the Hindu Law, according to the Benares School, which is the most orthodox of the different schools. The governing authority of that school is the Mitakshara. The compiler of the Mitakshara is said to have been an ascetic or devotee, and from that source nothing at variance with the religion of the Hindus is likely to have flowed. The Hindu Law contains in itself the principles of its own exposition. The digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of Hindus, their Lordships observe that the case furnishes no evidence whatever, that the decision under appeal disturbs that harmony. On the contrary, the Judges of Appeal overrule a former decision given in their own Court, which, in their opinion, had disturbed it.

The Mitakshara, in the fifth and sixth sections of the Second Chapter, recognizes two successive classes of heirs: first, 'gentiles;' next, bandhus; after them it places certain special persons, and after these last the State, the *ultimus hæres*. Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The 'family' is the cherished institution of Hindus. Individual separate ownership is less the subject of the general remarks of commentators on the Hindu law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may reasonably be regarded, among a patriarchal people, as a source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the fifth and sixth sections of the Second Chapter of the Mitakshara is in the strictest conformity to these principles. The gentiles or gotraja, from the *gotra*, are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the gotra. These conditions are all that are stated as necessary to the constitution of the class of gentiles.

LECTURE XIII. — the Judicial Committee of the Privy Council that, "under the Mitakshara Law, a great great great

As regulating preference of succession amongst them, the law of succession amongst gentiles classifies them further as *sapindas* and *samanodakas*. The first it treats as prior to the second, but excludes neither within limits wide enough to include the present plaintiffs. As the plaintiffs then in this case show a common ancestor, a gotra, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds, and strictly conforms to the language of the Mitakshara, it follows that it must be affirmed, unless it can be shown that the plain language of the Mitakshara has received some qualification by usage or judicial construction.

The decision of the present case does not require that the Court should distinguish sapinda from sapinda, nor define where sapindas cease and samanodakas begin. This is not a case of priority between two persons claiming as heirs or between two classes of heirs; it is one of asserted exclusion from inheritance raised by persons not competitors in the prescribed degrees of heirs.

The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindus,) *viz.*, who best can confer on the deceased and his ancestors not fully benefited the benefits which the grades of oblations offer in differing degrees. Where no sexual or personal incapacity exists, no ground of entire exclusion from inheritance exists, if the opposing parties confer inferior benefits, or benefits in equal degree only. In such a case what reason could justify a sentence of exclusion from inheritance on a claim to put a limitation on language which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy is inapplicable to the solution of that question of precedence.

The Sudder Court supported its opinion by the authority of two cases decided in the Privy Council,—the case of *Ranee Sreemuti Debia* v. *Ranee Kundlutta* (4 Moore's Indian Appeals, 292), and the case of *Rutcheeputty Dutt Jha* v. *Rajendra Narayan Rai* (2 Moore's Indian Appeals, 132): the very passages of the Mitakshara, and that from Manu which has been relied on in this (last) case and in the Court of Appeal in India, referring to the "seventh person" and the limits of the line of sapindas, received an authoritative

grandson of a common ancestor is not excluded from inheriting as a gentile to a great great great grandson on the ground, that he is too remote in descent from the common ancestor."

Lecture XIII.

"Propinquity," according to the Mitakshara, is the ruling principle of the law of inheritance.[1] This propinquity is *consanguineous*, according to Visvesvara Bhatta, and Balam Bhatta, the two eminent commentators of the Mitakshara; and it is measured—says Mitra Misra, the great expounder of the

Principle of propinquity.

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exposition. That case, it is true, was one to which the doctrine of the Mithila School was applicable, but the interpretation of the text was unaffected by that distinction.

If this last case be attentively considered and the learned and elaborate opinion of Mr. Harington be carefully studied, it would clearly appear that the preponderance of the opinions of the various Pundits then consulted was greatly on the side of the literal construction of the Mitakshara. The judgment of the Privy Council concludes, that the bandhus do not inherit till those on the father's side to the seventh degree have been exhausted. As the judgment is founded in a great degree on that of Mr. Harington, and expresses no dissent from his method of arriving at the seventh person by taking six degrees in the descending or ascending line; the Sudder Court was justified in treating this point as settled by authority, and the plaintiffs as gentiles within the degrees, and so entitled to inherit. The Pundits may be taken as fair exponents of the views of the Hindu people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree, amongst the class of *sapindas*, there is no reason for supposing that the plain construction of the language of the text of Manu and of its authoritative comment will clash with the religious feeling of Hindus.

Their Lordships are of opinion, that the decision appealed from, on the materials before the Court, on the issues in bar, was correct, and they will humbly advise her Majesty that the appeal be dismissed with costs (5 Bengal Law Reports, 293).

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[1] Mitakshara, II, 3, 4.

LECTURE XIII.

doctrines of the Benares School—by the spiritual benefits conferred on the deceased proprietor. Spiritual benefits, says the author of the Viramitrodaya, furnish the great test of consanguineous propinquity. Spiritual benefit, he adds, cannot create the *heritable right*, it is true ; but it determines, with precision, *the preferable right* of gotrajas and other heirs, where there is more than one claimant to the heritage. Let us apply now this principle of propinquity in determining the order of succession among *gotraja sapindas.* Apararka has applied it already, and let us see what he says on this subject :—

Propinquous sapindas of the deceased.

" On failure of brothers, their sons are heirs. In default of them, gotrajas are heirs. Among them the propinquous kinsman first inherits. Manu ordains : ' The propinquous kinsman of the (deceased) *sapinda* next inherits.'[1] The heritable propinquity also has been determined by him : ' To three *ancestors* must water be given at their obsequies ; for three is the funeral cake ordained ; the fourth *in descent* is the giver *of oblations* to them, but the fifth has no concern *with the gift of the funeral cake.*[2] ' " That person who gives the water and the cake to any of the three paternal ancestors to whom the deceased was bound to present them, is a propinquous *sapinda* of the deceased ; and the descendants of this person who may give the water and the cake to any of the ancestors to whom the deceased was bound to give them, are

[1] Manu, IX, 187.

[2] *Ibid*, IX, 186.

also propinquous sapindas of the deceased. Among these the uterine brother is a nearer sapinda to the deceased than any other propinquous kinsman, because he presents the water and the cake to the same ancestors to whom the deceased was bound to present them. The nephew is a little more remote than the uterine brother, because the former gives a cake—to his father—which has no connection whatever with the deceased. The son of the nephew is more remote than the nephew himself, because that son presents two pindas—to his father and grandfather—which have no connection whatever with the deceased. Similarly, any other description of brother, his son, and his grandson, (are related in different heritable degrees to the deceased).

Thus there are three propinquous sapindas in the father's line ; three in the grandfather's line ; and three in the greatgrandfather's line. In default of them, the three successive descendants of the great grandsons of each of the three immediate paternal ancestors are heirs, in order, of the deceased by reason of their sapindaship with him."[1]

Enunciation of the principle according to which preferable right is determined

What Apararka means is this: The preferable right of a gotraja sapinda rests upon his presenting the largest number of beneficial oblations either directly to the deceased, or to the ancestors to whom the deceased was bound to present them. The uterine brother presents three oblations to paternal

Calculation of benefit

[1] Apararka. Sanskrit College MS., 472.

LECTURE XIII.

from oblations.

ancestors, and three to maternal ancestors, which the deceased himself was bound to give. He is, therefore, preferred to the stepbrother, who presents one set of oblations to the three paternal ancestors only, and *not* to the maternal ancestors. The nephew presents two oblations which the deceased was bound to give; he is, therefore, preferred to his son, who presents only one oblation which the deceased was bound to offer. Here, in the father's line,

Sapindas in the father's line.

we have three sapindas: 1st, the brother; 2nd, the nephew; 3rd, the brother's grandson. The brother presents the largest number of beneficial oblations; his son presents one less; and his grandson two less. The preferable right being measured by the extent to which the benefits are conferred, the brother takes the first rank as an heir, the nephew occupies the second rank, and the brother's grandson takes the third rank. All these three kinsmen are called propinquous sapindas of the deceased, and they exclude the three remote descendants of the father, *viz.*, the son, the grandson, and the great grandson of the great grandson of the father. These three remote descendants of the father present only *divided* oblations to him, whereas the propinquous sapindas present *undivided* oblations to him. Those propinquous sapindas, then, who present undivided oblations to the ancestors of the deceased are preferred to those who present only divided oblations. In

In the grandfather's line.

the grandfather's line, as in the father's line, there

In the great grandfather's line.

are three propinquous sapindas who present undivided oblations. In the great grandfather's line also there are three propinquous sapindas who present undivided oblations. All these propinquous sapindas are in a body preferred to the remote sapindas, who present only the *wipings* or fragments of pindas, which are *less* beneficial than the undivided pindas. The propinquous sapindas exclude the remote sapindas; and the nearer line excludes the remoter line. The father's line is nearer to the deceased than his grandfather's line, and the grandfather's line is nearer than that of the great grandfather. You know the order of succession in the father's line. Apply the same method to the lines of the grandfather and great grandfather, and you know the *order* of succession of the propinquous sapindas of the deceased. After the propinquous sapindas are exhausted, you come to the remote sapindas. You first come to the remote sapindas of the father's line, then to the remote sapindas of the grandfather's line, and lastly to those of the great grandfather's line. The rule—"the nearer excludes the more remote"—by which you determined the order of succession of propinquous sapindas in each line, will also help you to ascertain the priority of the heirs among the remote sapindas.

Nearer line excludes the remoter.

Omission by Apararka of parents and other ancestors accounted for.

It will be observed that Apararka does not mention here the parents and the other ancestors of the deceased. There was no necessity for making any especial mention of the 'parents,' because they have

LECTURE XIII. been already provided for by the text of *Yajnavalkya* enumerating the different classes of heirs. As the parents take the lead in their own line, so the grandmother and the grandfather, the great grandmother and the great grandfather, head their own respective lines. Whether this inference is correct or not, we need not stop to inquire. They are included in the scheme of succession expounded by Vijnanesvara, and the Mitakshara is our guide in the Benares School. Where the Mitakshara expresses its meaning in language clear and distinct, no other authority, however esteemed, will be allowed to override the texts of Vijnanesvara. It is only where the meaning of the Mitakshara is doubtful that the exposition of Apararka, or Viramitrodoya, is to be taken to elucidate the obscure texts and to supply the deficiences of the Mitakshara.

You will also observe that in the texts of Apararka quoted above no mention is made of *the remote descendants of the deceased.* Yajnavalkya provided for the 'sons' of the deceased, and he included, his followers say, *the grandson* and the *great grandson* in this category. But no provision was made for the son, the grandson, and the great grandson of the great grandson of the deceased—the 5th, the 6th, and the 7th degrees in descent commencing from, and inclusive of, the propositus. The son, the grandson, and the great grandson of the deceased present

Remote descendants *undivided* oblations to him, while the remote des-

cendants—the 5th, the 6th, and the 7th degrees in descent—present only *divided* oblations to him. The former, therefore, must be preferred to the latter. The remote descendants again cannot come in immediately after the three immediate descendants. They must be postponed to the propinquous sapindas, in the ascending lines, who present oblations more beneficial to the deceased than those offered by the remote descendants.

LECTURE XIII.

postponed to the propinquous sapindas in the ascending line.

The rule then is, that the propinquous sapindas in the descending line, who present undivided oblations *directly* to the deceased, are included in the *first class* of heirs. In the ascending line, the parents and their three successive descendants constitute the *second class* of propinquous heirs. The grandmother and the grandfather with their three descendants are of the *third class.* The great grandmother and the great grandfather with their three descendants belong to the *fourth class.*

Rule as to different classes of heirs among the sapindas succinctly stated.

This is the *Order* of Succession among propinquous sapindas. Among the remote sapindas a similar rule is to be observed. The propinquous sapindas constitute the first four classes of heirs. After exhausting them we come to the remote sapindas of the descending line, who present divided oblations to the deceased.

The 5th, the 6th, and the 7th degrees in descent then compose the *fifth class* of sapinda heirs. The 5th, the 6th, and the 7th degrees in descent in the

LECTURE XIII.

father's line make up the *sixth class.* The same degrees in descent in the grandfather's and the great grandfather's line constitute the *seventh* and the *eighth classes* of sapinda heirs respectively.

Heirs in the lines of 4th, 5th, and 6th ancestors.

The scheme of succession of gotraja sapindas is not yet complete. We have not yet touched the lines of the 4th, 5th, and 6th ancestors of the deceased. These ancestors are remote sapindas of the deceased. He was bound to present *divided* oblations to them. Each of these ancestors with his three immediate descendants comes in after the eighth class of sapinda heirs mentioned above. These ancestors, with their several immediate descendants, thus constitute the *ninth*, the *tenth*, and the *eleventh classes* of heirs respectively. The three remote descendants in each of these lines again make up the *twelfth*, the *thirteenth*, and the *fourteenth classes* respectively.

Fourteen classes of sapinda heirs in all.

There are thus fourteen classes of sapinda heirs. *Four* of these classes belong to propinquous sapindas, and *ten* to remote sapindas.

Propinquous Sapinda Heirs.

1. The three immediate descendants of the deceased.

2. The mother, the father, and their three immediate descendants.

3. The grandmother and the grandfather with their three immediate descendants.

4. The great grandmother and the great grandfather with their three immediate descendants.

Remote Sapinda Heirs.

5. The three *remote* descendants of the deceased.
6. " " " " in the father's line.
7. " " " " in the grandfather's line.
8. " " " " great grandfather's line.
9. The 4th in ascent with his three immediate descendants.
10. The 5th " " " " " "
11. The 6th " " " " " "
12. The three remote descendants of the 4th ancestor.
13. " " " " " " 5th "
14. " " " " " " 6th "

Do they include widow, daughter, and daughter's son?

We have said nothing here about the widow, the daughter, and the daughter's son. In joint *undivided* families, the right of inheritance does not accrue to them. It is only in divided families, where the deceased was separated from his co-heirs during his lifetime, and the property was not re-united, that the widow, in default of male issue, shares the estate in the first instance ; the daughter inherits after her ; and the daughter's son next succeeds. By the doctrine of survivorship, to use the language of the Privy Council, the widow, the daughter, and the daughter's son are excluded from succession where the property is joint and undivided.[1] We will revert to this doctrine of survivorship enunciated by the Privy Council, after

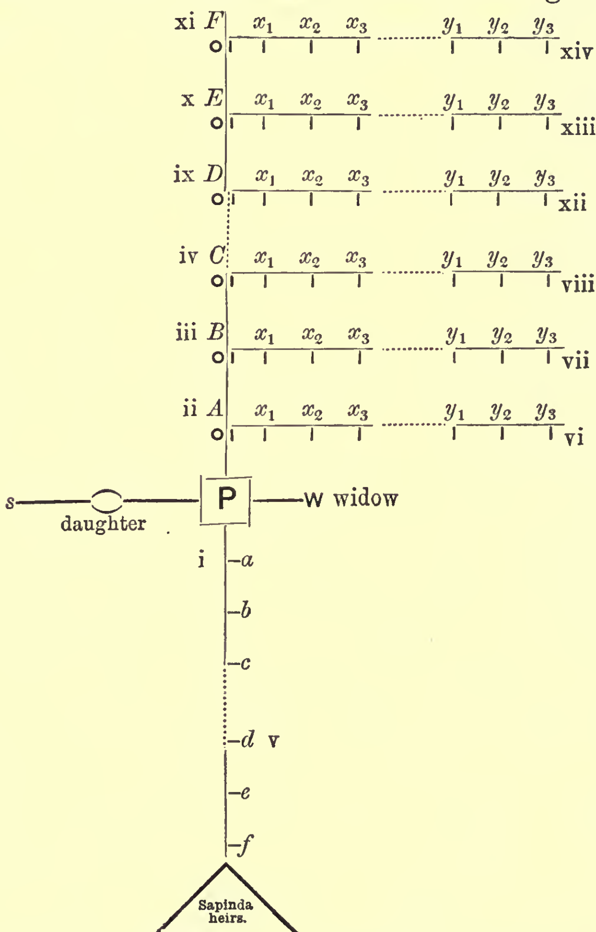
[1] 1 Sutherland's Privy Council Reports, 530.

LECTURE XIII.

I have explained to you the principles regarding the general course of descent of separate property.

Graphic view of the the Order of Succession among them.

The following table of succession will make clear our remarks on the different classes of heirs, and the Order of Succession which obtains among them :



Here *a*, *b*, *c*, represent the son, the grandson, and the great grandson of the deceased.

d, *e*, *f*, are the son, the grandson, and the great grandson of the great grandson of the deceased.

A, *B*, *C*, *D*, *E*, *F*, represent the first six ancestors of the deceased.

The circles represent female heirs. The small circles (*o*) under each line represent the female ancestors ; the small circle under the first ascending line (*A o*) represents the mother ; the small circle under the *second* ascending line represents the grandmother; and so on to the *sixth* ascending line. The widow and the daughter are also represented by small circles.

x_1, x_2, x_3 are the son, the grandson, and the great grandson of *A*, *B*, *C*....*F*.

y_1, y_2, y_3 are the son, the grandson, and the great granson of x_3 in each line.

s represents the daughter's son.

The dotted lines indicate a *break* in the continuity of succession.

Here you will observe the widow inherits after *c*, the great grandson. The daughter receives the inheritance after the widow. The daughter's son takes the heritage after his mother.

The course of descent, then, among gotraja sapindas, with regard to separate property, is as follows:—

a—Son.
b—Grandson. } 1st class (I.)
c—Great grandson.

Widow (O)
Daughter (O) } 1st class (II.)
Daughter's son.

LECTURE XIII.

Relation	Class
Mother (O)	2nd class.
A—Father.	
A—x_1 Father's son.	
A—x_2 " grandson.	
A—x_3 " great grandson.[1]	
Grandmother (O).	3rd class.
B—Grandfather.	
B—x_1 B's son.	
B—x_2 B's grandson.	
B—x_3 B's great grandson.	
Great grandmother (O).	4th class.
C—Great grandfather.	
C—x_1 C's son.	
C—x_2 C's grandson.[2]	
C—x_3 C's great grandson.[3]	
d—Great grandson's son.	5th class.
e " " grandson.	
f " " great grandson.	
A—y_1 Father's 4th descendant.	6th class.
A—y_2 " 5th "	
A—y_3 " 6th "	
B—y_1 Grandfather's 4th descendant.[4]	7th class.
B—y_2 " 5th "	
B—y_3 " 6th "	
C—y_1 Great grandfather's 4th descendant.	8th class.
C—y_2 " " 5th[5] "	
C—y_3 " " 6th "	
Fourth female paternal ancestor (O).	9th class.
D—Fourth male " "	
D—x_1 D's son.	
D—x_2 D's grandson.	
D—x_3 D's great grandson.	
Fifth female paternal ancestor (O).	10th class.
E—Fifth male " "	
E—x_1 E's son.	
E—x_2 E's grandson.	
E—x_3 E's great grandson.[6]	
Sixth Female paternal ancestor (O).	11th class.
F—Sixth male " "	
F—x_1 F's son.	
F—x_2 F's grandson.	
F—x_3 F's great grandson.	
D—y_1 D's 4th descendant.	12th class.
D—y_2 D's 5th "	
D—y_3 D's 6th "	

[1] Musst. Oorhya Koer *v.* Rajoo Nye Sookool, 14 W. R., 208; Kurreem Chand *v.* Oodung Gurrain, 6 W. R., 158.

[2] Rani Pudmavati *v.* Doolar Singh, 1 Suth. P. C. R., 178.

[3] Musst. Mukoda *v.* Musst. Kuleani, 1 Sel. Rep.; Duroo Singh *v.* Rai Singh, S. D. A., N. W. P., 1854, p. 521.

[4] Musst. Umroot *v.* Kulyandas, 1 Bor., 284.

[5] Koer Golap Singh *v.* Rao Kurrum Singh, 2 Suth. P. C. R., 474.

[6] Thakoor Jib Nath Singh *v.* The Court of Wards, 14 W. R., 17.

LECTURE XIII.

E—y_1	E's 4th descendant.	13th class.
E—y_2	E's 5th[1] „	
E—y_3	E's 6th „	
F—y_1	F's 4th descendant.	14th class.
F—y_2	F's 5th[2] „	
F—y_3	F's 6th[3] „	

Then come in the *Samanodakas* as heirs.

When the *Samanodakas* are thoroughly exhausted, the utmost limit of Gotraja relationship in the agnate line is reached, and the inheritance passes to a different line.

The table of succession given above refers to a *divided* family.

The text of Yajnavalkya, enumerating the heirs of a deceased preprietor, applies to the case of a person who, "being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue." "For," says the Mitakshara, "partition had been premised, and reunion will be subsequently considered."[4]

The Viramitrodaya also is of opinion that the text "The wife, the daughters, &c.," refers only to the estate of one who was separated and not reunited. The conflicting texts of Narada and the other ancient sages, with regard to the succession of different kinsmen, can be simply reconciled on the supposition that the text of Yajnavalkya refers only to the estate of one who was separated from his co-heirs, and was not subsequently reunited with him.[5]

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[1] Ram Singh *v.* Ugur Singh, 2 Suth. P. C. R., 330.
[2] Parasara Bhattar *v.* Rangaraja Bhattar, 4 Ind. Jur., 393.
[3] Rutche-putty Jha *v.* Rajender Narain Rai, 2 Suth. P. C. R., 1.
[4] Mitakshara, II, 1. 30, 39.
[5] Viramitrodaya, III, 1, 13.

LECTURE XIII.

Female gotraja sapindas

As regards the female *gotraja-sapindas*, their right to inherit has been warmly contested. The Mitakshara gives the heritable right to the daughter, the widow, and to the mother, grandmother, and other female ancestors. No mention is made of any other female as heir.

Not entitled to inheritance excepting such as are specifically mentioned in the Mitakshara.

Mitra Misra, the great expounder of the Mitakshara law, expressly says, that "the wife, the daughter, and the like, being specifically mentioned as entitled to inherit, the S'ruti text 'Therefore, females are feeble (*nirindriya*) and incompetent to inherit' must be taken to apply not to them, but to women other than those specifically mentioned."[1] The author of Viramitrodaya emphatically lays it down that females as a class are incompetent to inherit; an exception, however, is to be made in the case of the daughter, the widow, the mother, and other female ancestors whose heritable right is expressly provided for by special texts. The text of Baudhayana,—"A woman is not entitled to inherit; for thus says the Veda, 'Females and persons deficient in an organ of sense are deemed incompetent to inherit,'"—upon which the teachers of the Bengal and Dravira Schools base their doctrine of the incapacity of females in general to inherit, is also quoted by the Viramitrodaya; and the author is of opinion that this text alone will justify us in excluding females, other than those specifically mentioned, from inheritance. Taking this text of Baudhayana,

[1] Viramitrodaya, III, 7. 3; i. 13.

Mitra Misra says, with the S'ruti text cited before, there cannot be the shadow of a doubt that females as a class are *not* entitled to succeed.

LECTURE XIII.

"As to the explanation of the Vedic text," he continues, "given by the venerable *Vidyaranya* to the effect that this text does not apply to *inheritance* at all, how is it possible to accept it as a correct explanation, when it is in direct conflict with the statement of Baudhayana, *viz.*, 'women are not entitled to inherit.' Even granting that the word *indriya* in the Vedic text means, according to the context, *soma-juice*, still, inasmuch as there is no other Vedic text which would support the statement (of Baudhayana) that 'women are incompetent to inherit;' and as it is utterly impossible that the authority of *Smriti* (Baudhayana) should not be supported by the express words of the Veda; and inasmuch as again it does not stand to reason that (Baudhayana) would have declared the *incapacity of females* to inherit as a positive fact (had there not been an express prohibition in the Veda to that effect, our inference of the existence of such a prohibition in *Sruti*) is necessary and justifiable."

Two classes of gotraja females.

Gotraja females may be divided into two classes: 1, the daughters of the family, married and unmarried; 2, the widows of male *gotraja sapindas*.

1. Daughters of gotrajas, whether married or unmarried,

"The Mitakshara and its followers," says the Bombay Digest, "seem to interpret the term *gotraja* as 'belonging to the family.' For we read—

LECTURE XIII.

excluded from succession according to the Bombay Digest.

'The kinsmen sprung from the same family as the deceased (samánagotrajah sapindah), namely, the grandfather and the rest, inherit the estate. For the *bhinna gotra* sapindas are included by the term *bandhus*.'[1]

"The substitution of *samána gotraja* for *gotraja*, as well as the employment of *bhinna gotra* to designate the opposite of the term, both show that Vijnanesvara took *gotraja* in the sense of 'belonging to the same family.' If the term has this meaning, it would follow that no *married daughters* of ascendants, descendants, or collaterals can inherit under the text which prescribes the succession of the *gotrajas*. For the daughters, by their marriage, pass into another family, or, as the Hindu lawyers say in their expressive language, 'are born again in the family of their husbands.' But it seems improbable that even unmarried daughters of *gotraja sapindas* can inherit under the text mentioned. For though they belong to their father's *gotra* up to the time of marriage, they *must* leave it, under the Hindu Law, before the age of puberty; and consequently, by their succeeding to the estate of sapindas belonging to their father's families, the object of the law in placing *sagotra sapindas* before the *bhinna gotra sapindas*, namely, the protection of the family property, would be defeated, since such property through them would pass into their husbands' families. It

[1] Mitakshara, II, 5. 3.

seems, therefore, more in harmony with the principles on which the doctrines of the Mitakshara are based to exclude even unmarried daughters of *gotrajas*."[1]

Lecture XIII.

Also according to the Maharashtra School, which, however, excepts the sister.

"Nilakantha, on the other hand, takes *gotraja* in the sense of born in the family, and declares expressly that the sister inherits for this reason."[1] "Being begotten in her brother's family (gotra), she possesses the qualifications of a *gotraja*. The community of gotra (does) not indeed (exist in the case of a sister). But the quality of being a *sagotra* is not mentioned here as being a condition (of the right of) taking the wealth (as heritage)."[2]

Sister in the Maharashtra School

The sister then is entitled to inherit in the Maharashtra School; but the other daughters of male *gotraja sapindas* do not find a place in the line of heirs.

Balam Bhatta's exception in favor of daughter's daughter, &c.

Balam Bhatta, as you know, expressly admits the heritable right of daughter, daughter's daughter, sister, brother's daughter, and sister's daughter. He admits these not as *gotrajas*, but as included in the terms 'daughter's son,' 'brother,' and 'his (or her) son;' for, says he, the male gender everywhere includes the female gender. It would thus seem that he intended that the daughters of *all* male sapindas should be recognized as heirs. Balam Bhatta is an eminent scholiast of the Mitakshara, and his opinions are certainly entitled to respect. But you must have seen that,

[1] West and Bühler's Hindu Law, 179.
[2] Vyavahara Mayukha, p. 81.

LECTURE XIII.

with regard to the heritable right of women, his doctrines have not been generally accepted by the other teachers of the Benares School. It is enough, say the followers of the Mitakshara, that you admit the heritable right of the daughter, the widow, and the female ancestors. "Those who would include *sisters* in the term *brothers* are," as Kamalakara quaintly remarks, "totally ignorant of the laws and customs of the Hindu nation."[1] Hindu instincts are against admitting females as heirs—"they are feeble and incompetent to inherit." Family property should be preserved in the family, and should on no account pass into other families. The case of daughters is exceptional. Natural affection in that case has overridden the cold calculations of reason. Balam Bhatta was a great advocate of female rights, and naturally so. Tradition says, that Balam's gloss was the work of a female hand. Balam would have belied her nature if she had excluded the softer sex from inheritance. Her doctrines, however, when she expatiates on female rights and female liberty, only move a passing smile.

Nanda Pandita's exceptions in favor of daughter of the father and other ancestors.

Nanda Pandita would also admit sister's and brother's daughters as heirs. He is evidently not for recognizing the daughters of *all* male sapindas as heirs; but he says, "The daughters of the father and other ancestors must be admitted, like the daughters

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[1] Kamalákara's Viváda Tándava, MS., page 118.

of the man himself, and for the same reason." Nanda Pandita's opinions have shared the fate of those of Balam Bhatta.

LECTURE XIII.

According to the doctrines of the Benares School, then, the married and unmarried daughters of *gotraja-sapindas* are not entitled to inherit. But what about the wives and widows of male *gotraja-sapindas?* Are *they* entitled to succeed as heirs ? Are those females who are not named as heirs by special texts competent to inherit?

The wives and widows of male gotraja-sapindas

We have seen that the Viramitrodaya—which, according to the Privy Council, is properly receivable as an exposition of what may have been left doubtful by the Mitakshara and is declaratory of the law of the Benares School—is clear and positive upon this point; such females, says Mitra Misra, are excluded from inheritance.

excluded from succession according to the Viramitrodaya.

In the case of *Lala Joti Lal* v. *Mussamat Durani Cowar* and in the case of *Mussamat Lal Koer* v. *Baboo Jaikaran Lal*, the questions were whether, according to the Mitakshara, in a divided family, a stepmother could succeed to the estate of her stepson; or a step-grandmother to the estate of her step-grandson. The cases came on before Mr. Justice Kemp and Mr. Justice Campbell, by whom, as they differed, the above questions were referred for the opinion of a Full Bench of the Calcutta High Court, composed of Sir Barnes Peacock, Mr. Justice Sambhu Nath Pandit, and three other learned Judges. The opinion

Full Bench Ruling of the Calcutta High Court denying the grandmother's right to succeed.

84

LECTURE XIII. of the Full Bench, on the question referred to them, was delivered by Sir Barnes Peacock, C. J.:[1]

It is clear that, according to the law as current in Bengal, the stepmother cannot succeed to the estate of her stepson. But it is contended that, according to the Mitakshara, which is the law prevalent in Mithila, a different rule prevails. We have considered the authorities cited in the course of the argument, and are clearly of opinion that the stepmother cannot succeed. It was admitted that the decisions in *Bishenprea Munee* v. *Rani Soogunda* and *Narainee Debeh* v. *Hirkishor Rai* are the only express authorities in her favor. In those cases the right of the stepmother was upheld, but doubts are thrown upon them by Mr. Macnaghten in his Notes.

The question depends upon the sense in which the word '*mata*' is used in the Mitakshara in the Chapters on Inheritance. It was urged, that when a distribution is made after the life of the father, a stepmother is included under the word 'mother.' In the Mitakshara, the rule is laid down at page 285, para. 2, where it is said, "Of heirs separating after the decease of the father, the mother shall take a share equal to a son;" and our attention was called to the fact that, in the Mitakshara, there is nothing to show that the stepmother was not included, whereas in the Dayabhaga, page 63, para. 30, the stepmother is expressly excluded. We think that the rule, whatever it may be in the case of partition, is not necessarily applicable in the case of inheritance; and that although the word '*mata*' may, in some cases, include a stepmother, it does not necessarily do so in all cases. The

[1] Sup. Bengal Law Reports, Full Bench Rulings, Part I, p. 37.

cases cited from Macnaghten's Hindu Law, page 50, related to partition; we must look to the circumstances of each particular case in which the word is used. It would be contrary to the reason for which, according to the Mitakshara, a mother succeeds to her natural son in preference to his father to hold that the mother includes a stepmother. In Chapter II, page 343 of the Mitakshara (4), it is said: "On the failure of those heirs (speaking of daughters and daughter's sons) the two parents (meaning the mother and the father) are successors to the property" (para. 1). Paragraph 2 assigns a reason why, in construing the above test, the mother takes the estate in the first instance, and on failure of her, the father. Paragraph 3 proceeds: "Besides, the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance, conformably with the text—'To the nearest sapinda the inheritance next belongs.'" In the note to para. 3 it is said: "The mother is, in respect of sons, not a common parent to several sets of them, and her propinquity is, therefore, more immediate compared with the father's. But his paternity is common, since he may have sons by women of equal rank with himself, as well as children by wives of the Kshetria and other tribes, and his nearness is, therefore, mediate in comparison of the mother's; the mother, consequently, is nearest to her child, and she succeeds to the estate in the first instance, since it is ordained by a passage of Menu, that the person who is nearest of kin shall have the property."

The reason given in the above-cited passage from para. 3 shows that a stepmother is not intended to be included

LECTURE XIII.

in the word 'mother;' and Strange, in his book on Hindu Law, page 144, refers to the paragraph as an authority for the text—"Stepmothers, where they exist, are excluded." There are other passages in the Mitakshara with regard to the right of grandmothers to succeed to the property of grandsons in preference to grandfathers, which show that step-grandmothers could not be included. See Chapter II, sec. 4, para. 2, and sec. 5, para. 2, and the notes on those passages. For the above reasons we are of opinion, that a stepmother cannot take by inheritance from her stepson.

We may remark that our opinion is in conformity with the table of succession prevalent in North-Western Schools, including Mithila, prepared by Babu Prosunno Kumar Tagore, according to the Mitakshara, Vivida Chintamani, and other works, in which it will be found that 'stepmother' and 'step-grandmother' are entered as *nil*. The table immediately succeeds the preface to Vivida Chintamani by Prosunno Kumar Tagore.

This opinion will be communicated to the Division Court, by which the question was referred to us, for their information and guidance.

In the second case (No. 8 of 1861), the question was whether, under the Mitakshara law, assuming a family to be divided, the widow of the paternal grandfather of the deceased can succeed, she not being the mother of deceased's father.

The case came on in regular appeal before Mr. Justice Bayley and Mr. Justice Campbell, who were of opinion that the step-grandmother was entitled to succeed; but on application for a review of judgment, they referred the question for the opinion of a Full Bench.

The opinion of the Full Bench was delivered by Sir Barnes Peacock, C. J.:—" We are clearly of opinion, for the reasons given in our judgment in Special Appeal No. 3024 of 1862, that a step-grandmother cannot, under the circumstances above stated, succeed to the property of the step-grandson."

Mitakshara law as accepted in Bengal does not recognize the title of the second class of gotraja females.

It will be seen from this that the Calcutta High Court has decided that the stepmother and the step-grandmother are *not* in the line of heirs. The father and the grandfather are *gotraja-sapindas;* their widows, therefore, are the wives of male *gotraja-sapindas*. They have been declared by the highest authority in Bengal as *incompetent* to inherit according to the Mitakshara law. By the Mitakshara law, as accepted in Bengal at any rate, the widow of a *gotraja-sapinda* then is *not* entitled to the inheritance.

Gauri Sahai v. Rukko.

In the case of *Gauri Sahai* v. *Rukko*,[1] the Allahabad High Court said :—

" We are of opinion that, looking to the received interpretation of the law and the customary law prevalent in this part of India, none but females expressly named as heirs can inherit. The Mitakshara is the law which governs this part of the country, but the commentary on it of Mitra Misra in Viramitrodaya is also of great weight and authority. Admittedly, that author has interpreted the law to the effect that the admission of the widow and certain others

[1] I. L. R., 3 All., 45.

LECTURE XIII.

depends on express texts, while females generally are excluded from inheriting.

"'But a daughter-in-law and the other (female relations) receive merely food and raiment, because their nearness (to her mother-in-law) as a sapinda relation has no force, it being opposed by special texts. For the Veda (declares):—"Therefore women have no right to use sacred texts or to a share"—and Manu gives, in conformity with that (passage) the following text:—"Women have no right to use the sacred texts and no right to a share, they are (foul like) falsehood. That is a settled rule." Besides, the established doctrine of the Southern lawyers, such as the author of the Smriti Chandrika, and of all the Eastern lawyers, of Jimutavahana and the rest, is, that those women only have a right to inherit whose claim has been particularly mentioned in special texts, such as, "The wife and the daughters likewise, &c.," but that (all) others are prohibited from receiving shares by the (above quoted) texts of the Veda and of Manu.'[1]

"There is also a passage in Viramitrodaya,[2] in which the author relies on a passage of Baudhayana interpreting the Vedic text for the exclusion of females—'A woman is not entitled to inherit; for thus says the Veda, females and persons deficient

[1] West and Bühler's Translation of Viramitrodaya, p. 527.
[2] Vira, III, vii, 3.

in an organ of sense (or a member) are deemed incompetent to inherit.' LECTURE XIII.

"It is contended that the proper translation of the Vedic text should be—'Women are considered disqualified to drink the *soma juice*, and receive no portion (of it at the sacrifice).' Mitra Misra appears to have considered this alternative interpretation, and to have rejected it, asserting that, supposing that the word '*indriya*' in the original means *soma juice*, yet the word '*adayadatva*' in itself is sufficient to imply a prohibition to inheritance of women. Whatever force the objections taken to the interpretation placed on the Vedic text by the author of Viramitrodaya may have, we consider that we are bound to accept as law the law of inheritance founded on that interpretation. The rule laid down by the Judicial Committee of the Privy Council in *Thakoorain Sahiba* v. *Mohun Lall*,[1] is one which should guide us here. Their Lordships observed with reference to a particular construction advanced by counsel: 'Were the arguments in favor of the construction which Mr. Piffard would put upon the Mitakshara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that Treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by

[1] 11 Moore's I. A., 386.

LECTURE XIII. the *dicta* of received Treatises, by some novel interpretations of vague and often conflicting texts of the Hindu commentators, would be most dangerous, inasmuch as it would unsettle existing titles.' We have not only the view of the author of Vira Mitrodaya, but of Smriti Chandrika:[1]—'Accordingly Baudhayana commencing with "a woman is entitled" proceeds "not to the heritage, for it is stated in Sruti that females and persons deficient in an organ of sense, or member, are deemed incompetent to inherit;"' and in Chap. XI. i., pl. 56, the above prohibition is said to refer to 'females other than *patni* and the like, whose competency to inherit has been expressly provided for.'

"We thus find that the disputed interpretation of the Vedic text has received the authority of the authors of Vira Mitrodaya, Smriti Chandrika, and others, and the principle of the general exclusion of females from inheritance has been affirmed by writers on Hindu law, and is admittedly accepted in Bengal and Madras; and we believe there can be no doubt that the customary law of this part of India excludes females not expressly named as heirs from inheritance, and the course of decisions of our Courts has been generally in accordance with that rule."

It was accordingly held, that, "according to the Mitakshara law none but females expressly named can inherit, and the widow of the paternal uncle of

[1] Ch. IV, pl. 4.

a deceased Hindu, not being so named, is *not* entitled to succeed to his estate."[1]

LECTURE XIII.

In Western India their rights co-extensive with their husbands.

According to the Hindu law obtaining in Western India, however, the wives of all *gotraja-sapindas* and samanodakas have been declared to have rights of inheritance co-extensive with those of their husbands, immediately after whom they succeed.[2]

Lallubhai Bapubhai v. Mankuvarbai.

In the case of *Lallubhai Bapubhai* v. *Mankuvarbai*, the questions were, whether the widow of the first cousin on the paternal side (the widow of paternal uncle's son) was entitled as such widow of a paternal first cousin to be regarded as a *gotraja-sapinda* of the propositus; and if she be so, what would be her position in the table of succession? Would she inherit immediately after her husband, and thus be entitled to succeed to the inheritance in preference to a more remote collateral male relative—the sixth descendant of the fifth ancestor? The Bombay High Court held that, "In the Presidency and Island of Bombay, the wife is a *sapinda* as well as a *gotraja* of her husband, and if he die (without leaving a son or grandson), she, on the subsequent death of

[1] The following cases were cited in the judgment: Bhuganee Daiee *v.* Gopalji (S. D. A., N. W. P., 1862, Vol. I., 306); Soodeso *v.* Bisheyshur Singh (S. D. A., N. W. P., 1864, Vol. II., p. 375); Deo Koonwur *v.* Gumbheer Koonwur (S. D. A., N. W. P., 1864, Vol. II., p. 284); Deena Nath *v.* Sohnee (S. D. A., N. W. P., January to May, 1866, p. 65); Padmavati *v.* Doolar Singh (4 Moore's I. A., 259); Lala Jotee Lall *v.* Doorannee Kooer (W. R., Sp. No., 173); Ram Dyal Deb *v.* Magnee (1 W. R., 227); Radha Pearee Dossee *v.* Doorga Monee Dossia (5 W. R., 131); Gunga Pershad Kur *v.* Shumbhoo Nath Burmun (22 W. R., 393).

[2] Lakshmibai *v.* Jairam Hari, 6 Bomb. High Court Rep., 152.

LECTURE XIII.

his separated sapinda, and in the absence of any specially designated heir entitled to preference, ranks in the same place in the order of succession to the property of such separated *sapinda* as her husband would have occupied if he were living. Thus, the widow of a first cousin *ex parte paterna* of the deceased *propositus* is prior in order of succession to a fifth male cousin *ex parte paterna* of the same.

"Or, in other words, a wife becomes by her marriage a *sagotra-sapinda* of her husband, and his *gotraja-sapindas*, and in that capacity succeeds as a widow to the property which he would have taken as a *sapinda* before the male representative of a remoter branch."[1] The judgment of the High Court at Bombay has been affirmed by the Privy Council. The judgment of the Privy Council, in this case, is very important, and is quoted *in extenso*.[2]

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[1] I. L. R., 2 Bomb., 388.

Privy Council Ruling on the above case.

[2] Judgment of the Lords of the Judicial Committee of the Privy Council, on the appeal of *Lallubhai Bapubhai and others* v. *Cassibai and others*, from the High Court of Judicature at Bombay, delivered 24th June, 1880.

The question which arises in this appeal relates to the succession to the estate of Mouljee Nundlall, a Hindu inhabitant of Bombay, which opened on the death of his widow Surusvuthebai. Mouljee died in 1840, leaving as his only child a daughter, who died childless in the lifetime of his widow. The widow died in 1862.

At the time of Mouljee's death, his paternal first cousin, Gungadass Vizbhukundass, was his nearest male relative. He died in the lifetime of Mouljee's widow, leaving no son, but leaving a widow, Mancooverbai, the original defendant in this suit, and two daughters, who all survived Mouljee's widow. Mancooverbai died during the progress of the suit, and the respondent Cassibai is her executrix.

In the case of *Kesserbai* v. *Valab Raoji*[1] the Bombay High Court said :— LECTURE XIII.

"Although the stepmother cannot, in the Presi-

The first and second plaintiffs in the suit claim to be entitled to the estate of Mouljee, as being his nearest male heirs when the succession opened on the death of his widow.

Their relationship is clearly stated in the following passage of the judgment of Chief Justice Westropp :

"It has not been denied that, according to the law which, under the Mitakshara and Mayukha, prevails in this Presidency, Lallubhai and Mulchand (the father of Cassidas, the second plaintiff) were gotraja-sapindas of Mouljee; the common ancestor of them and of Mouljee was Moti Lall, who, counting inclusively, was sixth in ascent from Mouljee, and the brothers Lallubhai and Mulchand were seventh in descent from Moti Lall. They are, therefore, on the extreme verge of sapinda-relationship."

The other plaintiffs are purchasers from the first two plaintiffs. Several of the issues raised in the suit have been finally disposed of by the Courts in India, and the single question to be now decided is, whether, by the Hindu Law of Inheritance prevailing in Western India, Mancooverbai, the widow of Gungadass, who as paternal first cousin was related in the third degree to Mouljee, became by her marriage with Gungadass a gotraja-sapinda of Mouljee, and as such entitled to succeed to his estate in preference to the first and second plaintiffs, who were related to him only in the remote degree above indicated.

Mr. Justice Bayley, sitting as a Judge, exercising the original jurisdiction of the High Court, on his first hearing of the cause, decided in favor of the right of the widow, following the decision of a Division Bench in the case of *Lakshmibai* v. *Jayram Hari* (6 Bombay High Court Reports, 152). Upon a remand of the case on other points, Mr. Justice Bayley, acting on his own opinion, came to an opposite conclusion upon the question of the widow's right from that arrived at in the decision he had before followed, and gave a decree in favor of the plaintiffs. On appeal, this last decree was reversed by the unanimous judgment of a Full Bench of the Bombay High Court, and Mr. Justice Bayley's original judgment was restored.

It is fully acknowledged by the learned Judges of the High Court that the law prevailing in Bengal and Southern India is opposed to the right claimed by the widow, but they arrived at the conclusion that a different interpretation of the law has been accepted in Western India, and the elaborate judgments of the Chief Justice (in which Mr. Justice

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[1] I. L. R., 4 Bomb., 208.

LECTURE XIII. dency of Bombay, be introduced as an heir under the term 'mother,' we think that, as a wife of a *gotraja-*

Sargent concurred) and of Mr. Justice West are directed to elucidate the grounds on which the distinction rests.

The books whose authority is principally followed in Western India are Manu, the Mitakshara, and the Mayukha. These are stated by the Chief Justice, and, no doubt, correctly, to be " the reigning authorities " in the Presidency of Bombay. The learned Judges have sought to support their decision in favor of the widow from passages found in these works. It is acknowledged that the rule of succession, to which they have given effect, is but dimly enunciated in these passages, but the Judges have considered that the interpretation which has been given to them in Western India, evidenced by decisions and the opinions of Shastris, has fixed and determined the law for that part of India.

A text of Manu was cited, which is supposed to affirm the right of women to inherit:—" To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then, on failure of sapindas and their issue, samanodakas or distant kinsmen shall be the heir " (Chapter IX, 187). The words 'male or female' appear to have been imported into the text by Sir W. Jones and Mr. Colebrooke on the authority of a commentator, Kalluka Bhatta. Even if it be assumed that these words are rightly introduced, the text, though it sanctions the principle that women may inherit as sapindas, and so is consistent with the right of the widow to inherit as a sapinda of her husband's family, does not affirm that right.

According to the received doctrine of the Bengal and Madras Schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Baudhayna, which declares that " women are devoid of the senses, and incompetent to inherit." The same doctrine prevails in Benares; the author of the Viramitrodaya yields, though, apparently, with reluctance, to this text (Chapter III, Part 7).

The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in Western India, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case. She still, however, has to establish that she is a gotraja-sapinda of her husband's family, and as such, entitled by the law prevailing in Bombay to inherit the estate of one of its members. It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. But a statement of the doctrine in a note by Mr. Borradaile to his reports may be referred to. He says,—" Because a woman on her marriage enters the gotra of her husband, so respondents, being sagotras of Pitambur,

sapinda (using that term in its larger sense) of the propositus and, therefore, according to the doctrine

LECTURE XIII.

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are sagotras of his wife also" (I Borradaile. 70, Note 2). Whether the right to inherit follows as a consequence of this sapinda-relationship, is the question to be considered.

The following passage from the Achara Kanda of the Mitakshara was cited to show that sapinda-relationship depends on having the particles of the body of some ancestor in common, and not on the connection derived from the capacity of making funeral offerings. It was also cited for the declaration that husband and wife and brothers' wives are sapindas to each other:

"(He should marry a girl) who is non-sapinda, *i.e.*, a-sapinda (with himself). She is called his sapinda who has (particles of the body of some ancestor) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda-relationship) to his paternal grandfather and the rest, because, through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda-relationship) to his maternal grandfather, and the rest through his mother; so also (is the nephew) a sapinda-relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda-relationship) with paternal uncles and aunts and the rest; so also the wife and the husband are sapinda-relations to each other, because they together beget one body (the son). In like manner brothers' wives also are (sapinda-relation to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore, one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent." A translation of some passages in the Sanskara Mayukha to the same effect will be found in the judgment of Chief Justice Westropp, of which the following is an extract:—

"Therefore (to explain the different parts in the formation of the word 'a-sapinda' by dissolving the compound 'a-sapinda') she is sapinda who has one and the same pinda (body) (*i.e.*) dehavayava (constituent atoms): *na* (not) sapinda is a-sapinda. Thus, therefore, the father's constituent atoms, *viz.*, blood, fat, &c., directly enter into the body of

LECTURE XIII. of the Mitakshara and the Mayukha a *gotraja-sapinda* herself, she cannot be regarded as excluded alto-

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the son, and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great grandfather, &c., also somehow the transmission of constituent atoms mediately exists. So with the mother, &c., also so the wife has sapindya from the husband, because they are the generators of one body. In some instances, sapindya exists by reason of being the holders of the same constituent atoms. Thus, the wives of brothers are sapindas to each other, for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the sapindya in other cases also should be inferred."

Vijnanesvara and Nilakantha were, no doubt, treating in these passages of sapinda-relationship in connection with marriage ; but no further definition of sapindas is given in those parts of their respective books which treat of inheritance. The learned Judges below have inferred, in the absence of any indication to the contrary, that the abovementioned definitions were intended by the authors of the Mitakshara and the Mayukha to apply wherever in those books sapindaship was treated of, and, consequently, where it was treated of in relation to the right to inherit. In addition to the abovementioned authorities, the Chief Justice refers to the Dattaka Mimansa as strongly maintaining the doctrine that sapindaship depends upon community of corporal particles, and not upon the presentation of funeral offerings to the pitris.

It was contended by the learned Counsel for the respondents that, even if sapindaship, for the purpose of inheritance, had to be determined by the efficacy of funeral oblations, the widow would be entitled as a gotraja to succeed, because her offerings would benefit the manes of her husband's grandfather Kissoredass, the common ancestor (in the third degree) of her husband and Mouljee. Their Lordships do not think it necessary to consider the authorities on which this contention was supported (though they may observe that a judgment of Mr. Justice Mitter affirming that a sister's son is, under the Mitakshara, as interpreted in Benares, entitled to succeed, throws great light on the subject (2 Bengal Law Rep., Full Bench Rul., 82), since they are prepared to assent to the conclusion to which the Judges of the High Court, upon consideration of the authorities, arrived, that by the law of the Mitakshara as interpreted and accepted in Western India, the preferential right to inherit in the classes of sapindas is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these tests was adopted.

If then, as already pointed out, the wife, upon her marriage, enters

gether from succession to a stepson. This is a necessary inference from the cases of *Lakshmibai* v.

LECTURE XIII.

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the gotra of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance, which did not adopt the principle of the general incapacity of women to inherit. But though it may be consistent with this theory of sapinda-relationship to admit the widow so to inherit, the existence of the right has still to be established. It is acknowledged that the widow of a collateral relative is nowhere specified and named as heir to members of her husband's family; she must, therefore, come into the succession, if at all, as one of the class of gotraja-sapindas; and it is in this way that her claim has been put forward at the bar. The author of the Mitakshara, after discussing in detail the series of heirs first entitled to inherit down to brothers' sons, proceeds in Chapter II, sec. 5, to treat of the succession of gentiles. Extracts from this section are given in the judgment of the Chief Justice, the translation of Mr. Colebrooke being amended by substituting for the English rendering of the names of the various classes of kindred, the Sanskrit names given in the original.

The first six slocas are thus rendered:—

1. "If there be not brothers' sons, gotrojas share the estate. Gotrajas are the paternal grandmother and sapindas and samanodakas.

2. "In the first place, the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before cited. 'And the mother also being dead, the father's mother shall take the heritage.' No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course succeed immediately after the nephew; and thus there is no contradiction.

3. "On failure of the paternal grandmother, gotraja-sapindas, namely, the paternal grandfather and the rest, inherit the estate: For bhinna-gotra-sapindas are indicated by the term bandhu.

4. "Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

5. "On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue inherit. In this manner must be understood the succession of samana-gotra sapindas.

6. "If there be none such, the succession devolves on samano-

LECTURE XIII. — *Jayram Hari* and *Lallubhai* v. *Mankuverbai*, but it is not necessary for us, and would be extra-judicial,

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dakas, and they must be understood to reach to seven degrees beyond sapindas, or else as far as the limit of knowledge and name extend. Accordingly, Vrihat Manu says: 'The relation of the sapindas ceases with the seventh person, and that of samanodakas extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra.' "

It cannot be said that these passages contain direct authority for the admission of a widow of a collateral relative to inherit as a sapinda to a member of her husband's family; but they were cited to show that women are entitled to inherit as sapindas, the paternal grandmother being named as the first sapinda for this purpose. There is a passage also to this effect in the Mayukha, Chapter IV, sec. 8, pl. 18.

That the mention of certain members of the family as gotraja-sapindas is not exhaustive, and that others than those expressly mentioned may be included in the class, may be inferred from the following passage in pl. 3 of Chapter II, sec. 5 of the Mitakshara cited above:—"On failure of the paternal grandmother, gotraja-sapindas, namely, grandfather *and the rest*, inherit the estate." It would seem, also, though the grandmother and great grandmother are alone expressly mentioned, that the wives of the remoter ancestors in the direct ascending line up to the seventh degree would likewise succeed to their descendants as sapindas. Moreover, it has been decided by this Board that the enumeration of bandhus contained in the Mitakshara is not exhaustive: *Gridhari Lall* v. *The Bengal Government* (12 Moore's Indian Appeals, 448). The reasons for so holding are applicable to the enumeration of sapindas, though, as Mr. Graham observed, the step from the wives of paternal ancestors to the wives of collaterals is a long one.

Mr. Justice West, after discussing the Mitakshara and some of its commentators, came to the conclusion that "upon the whole it would appear more probable than not, upon the text of the Mitakshara and its recognized exponents, that it did intend widows to be included among the gotrajas." Perhaps the most that can be said is, that the text of the Mitakshara is not inconsistent with the claim of the widow, and allows of an interpretation favorable to her right to inherit. The important point for consideration remains,—namely, whether such an interpretation has been given to the Mitakshara by its expounders and the lawyers of the Bombay School, and has been so sanctioned by usage and decisions as to have acquired the force of law.

The Mayukha is also very fully discussed in the judgment of Mr. Justice West, and his consideration of it led him to the conclusion that "if the foundation of the rights of widows of gotrajas under the

now to consider or determine at what points in the list of heirs in this Presidency the stepmother of the

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Mitakshara is slender, under the Mayukha it may be called almost shadowy." After this appreciation of the two leading authorities by a Judge who has much studied them, it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage.

Commentators on the Mitakshara are referred to in the judgments below, who have interpreted its text in a sense highly favorable to women. Two of them, whose opinions are closely applicable to the point under discussion, are thus referred to by Mr. Justice West:

"Visvesvara, the author of the Subodhini, the chief commentary on the Mitakshara, says, that 'gotraja' may properly be taken to include both males and females; and Balam Bhatta, insisting on the same view, applies it to the determination of the right of a predeceased son's widow, whom he places next after the paternal grandmother."

The author of the Vaijayanti, a commentary on Vishnu, appears to have held that the son's widow would succeed in preference to the daughter. This opinion is referred to in the remarks of Mr. Colebrooke upon a case in the Appendix to Strange's Hindu Law (Vol. II. 234). Mr. Colebrooke thinks that it is opposed to the prevalent doctrine of the school of the Mitakshara, which is, that the daughter inherits in preference to the son's widow. He does not appear to question the right of the widow to inherit as a sapinda, though, no doubt, it was unnecessary to do so in discussing the question of preference. Their Lordships will now pass to the recorded answers of the Shastris, and the decisions of the Courts bearing on the question. The answers of the Shastris, which have been referred to at the bar, will be found in a Digest of the Hindu Law of Inheritance by Messrs. West and Bühler, compiled from the replies of the Shastris recorded in the Courts of the Bombay Presidency. Mr. West is the Judge of the High Court, whose judgment has been already adverted to. These replies are in many cases unsatisfactory and incorrect, but they are numerous, and the series taken as a whole undoubtedly recognizes and affirms the right of the widow to inherit as a gotraja-sapinda to members of her husband's family. It is not necessary to refer to these answers in detail. Many of them are cited and commented upon in the judgment of Mr. Justice West, and among these are answers which affirm that a sister-in-law inherits in preference to distant cousins, and even to first cousins of the propositus.

Some early decisions of the Sudder Adawlut, reported by Borradaile, are to the same effect. In the case of *Dhoolubh Bhai and others* v. *Jeevee* (A.D. 1813), it was held, that Jeevee, the widow of the son of a brother of Pitambur, the propositus, was entitled (on the death of Pitambur's widow) to succeed to his estate, and to hold it

LECTURE XIII. *propositus*, the widow of his brother, and the paternal uncle's widow enter. It is, for the purposes of the

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for her life in preference to a great grandson of another brother of Pitambur (1 Borradaile, 67). It is not, however, stated in the Report when Jeevee's husband died.

In another of the cases cited from Borradaile—*Mukalukmee* v. *The Grandson of Kripastrookul* (2 Borradaile, 510)—the Sudder Court held, that a predeceased son's widow was entitled to succeed in preference to the sons of a daughter. This case, however, seems to have been decided upon a custom of the caste of Oudeech Brahmins. As a decision on the general law, apart from custom, it may not be capable of support, a sister's son being specially provided for by the Mitakshara (Chapter II, sec. 3, pl. 6).

In a later case reported (Borradaile, 1824), it was held, that the widow of a predeceased son was entitled to inherit in preference to the brother of the propositus: *Roopchund Tilukchund* v. *Phoolchund Dhurmchund and another* (2 Borradaile, 616). This seems to be a direct decision on the right of the widow to inherit, though, whether, in the order of heirs, the preference was rightly accorded to her in this case may be questioned.

In the case of *Lukshmibai* v. *Jayram Hari and others*, the High Court of Bombay (Justices Lloyd and Melvill) gave a clear and unqualified judgment in favor of the right of the widow of a predeceased collateral relative to succeed in preference to a more remote collateral male relative of the propositus. The High Court expressly found that this order of succession was in accordance with the law of inheritance prevailing on the Bombay side of India.

The High Court in the present case, after an exhaustive review of the authorities and precedents bearing on the question, have unanimously arrived at the same conclusion. Great weight is undoubtedly due to this decision, not only from the learning and research displayed in the judgments separately delivered by Chief Justice Westropp and Mr. Justice West, but also from the circumstance that both these learned Judges have had great and peculiar opportunities of becoming acquainted with the law of inheritance prevailing in Western India. The Chief Justice has passed a long judicial career in the Courts of Bombay, and Mr. Justice West is one of the compilers of the Digest of the Law of Inheritance, to which reference has already been made. Their Lordships do not find any satisfactory ground which should induce them to dissent from the conclusion of the High Court, that the doctrine which has actually prevailed in Bombay is in favor of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, with costs. (I. L. R., 5 Bom., 110.)

present case, sufficient to say that, compounded as the law of this Presidency on the subject of the sister's and half-sister's succession is from the Mayukha and Mitakshara as specially construed here by Balam Bhatta and Nanda Pandita—the latter of whom specially designates 'the daughter of the father' as an heir, as does the Nirnaya Sindhu, (which has also been called in aid,) the 'half-sister,'—we think that the sister and the half-sister both have precedence over the stepmother as well as over the brother's wife and the paternal uncle's widow on this side of India. There was not any intention on the part of the Court which decided *Lallubhai* v. *Mankuverbai* to displace a person so specially introduced as the sister (including in that term the half-sister) from her position on the roll of heirs. The rule laid down in that case (that the widows of *gotraja-sapindas* stand in the same places as their husbands, if living, would respectively have occupied) was intended to be subject to the right of any person whose place is so specially fixed on that roll, as (amongst others) that of the sisters. If this were not so, the widow of a deceased Hindu would rank before his son, inasmuch as the father is nearer to himself than the son is to him."

It was accordingly *held*, that the sister and half-sister inherit in priority to the stepmother and the paternal uncle's widow.

It has also been decided that, under the Hindu law as prevailing in the Presidency of Bombay, a full

LECTURE XIII. sister is the heir of her deceased brother in preference either to his stepmother or paternal first cousin; and that a daughter-in-law is entitled to succeed in priority to the paternal first cousin of the deceased owner.[1]

In the case of *Bharmangavda* v. *Rudrapgavda*, the question was, whether the widow of a collateral should take an absolute estate in the property of her husband's *gotraja-sapinda*, which she could dispose of by will after her death? In delivering its judgment, the Bombay High Court remarked :—

"The original rule of Hindu law, we take it, is, that women generally are excluded from inheritance;[2] and the reason for this will be obvious to those who know anything of the history of Hindu institutions. The first innovation on this rule was the admission of a daughter to inherit, and she was assigned only the last place in the line of succession, and this only to save escheat to the Sarkar, or, as we call it, the Crown. Further relaxations of the rule have been recognised by our Courts on the authority of texts in the Mitakshara and the Mayukha; but we are not prepared to go beyond the decisions. The case of *Lallubhai* v. *Mankuverbai* is an authority for the proposition that a wife is a *gotraja-sapinda* of her hus-

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[1] Vinayak *v.* Lakshmibai (1 Bom. H. C. Rep., 117; 9 Moore's I A., 516); Lakshmi *v.* Dada Nanaji (I. L. R., 4 Bom., 210); Biru *v.* Khandu (I. L. R., 4 Bom., 214); Vithal Das *v.* Jeshu Bai (I. L. R., 4 Bom., 219); Sakharam *v.* Sitabai (I. L. R., 3 Bom., 353).

[2] Bhan Nanaji Utpat *v.* Sundrabai (11 Bom. H. C. Rep., 272).

band, and on his death will take an estate, as his heir, in preference to certain more remote relations,—that is, before the male representative of a remoter branch. The case of *Vijyarangam* v. *Lakshman*[1] is an authority for the proposition that all property acquired by a woman by inheritance becomes her *stridhan*, and states the rules that regulate its subsequent devolution according to the texts of the Mitakshara and Mayukha respectively; and *Lakshmibai* v. *Jayram Hari* is an authority for the proposition that the wives of all *gotraja-sapindas* and *samanodakas* have rights of inheritance co-extensive with those of their husbands immediately after whom they succeed. But in none of the cases above cited do we find authority for the proposition that the estate inherited by a wife or widow is an absolute estate alienable by will to a stranger. A sister, taking as heir to her brother, takes his property with an *absolute* power of disposition over it,[2] but a man's widow admittedly takes only a limited estate,—that is, an estate limited to her life, and so also a mother inheriting from her son.[3]

"There is, so far as we know, and we have been through the cases carefully, *no* authority for the proposition that the widow of a collateral takes an absolute estate in the property of her husband's *gotraja-*

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[1] 8 Bom. H. C. Rep., 244.

[2] Bhaskar Trimbak Acharya *v.* Mahadev Ramji, 6 Bom. H. C. Rep., 215.

[3] Narsapa Lingapa *v.* Sakharam Krishna, 6 Bom. H. C. R., 1.

LECTURE XIII.

sapinda, which she can dispose of by will after her death."[1]

It was therefore *held*, that the widow of a collateral does not take an absolute estate in the property of her husband's *gotraja-sapinda*, which she can dispose of by will after her death.

Samanodakas succeed in default of gotraja-sapindas,

In default of gotraja-sapindas, says the Mitakshara, the succession devolves on samanodakas,[2] and they must be understood to reach to seven degrees beyond the gotraja-sapindas, or else as far as the limits of knowledge as to birth and name extend.[3]

i.e., persons bearing the same family name with the deceased, and descended from a common progenitor.

All persons who bear the same family name, and can prove that they are lineally descended from a common ancestor, how high soever he may be in the genealogical tree, may claim the relation of samanodaka, and are entitled as such to inheritance. Two conditions are necessary to constitute a samanodaka. He must be of the same *gotra* as the deceased, and he must trace his descent from a common ancestor. As soon as a person can show that he bears the same family name, and is a descendant of the same common progenitor, he ranks as an *heir*, and takes the estate of the deceased on failure of *gotraja-sapindas*.

Not only are the seventh ancestor and his descend-

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[1] I. L, R., 4 Bom., 187.

[2] Nursing Narain *v.* Bhuttun Lall, W. R., Sp. No. 194; Musst. Dig Dye *v.* Bhuttun Lall, 11 W. R., 500.

[3] Mitakshara, II, 5, 6.

ants, the eighth ancestor and his descendants, and so on to the *fourteenth* degree known as samanodakas, but *all* the descendants beyond the range of sapindas, belonging to every line, ascending as well as descending, go also by the name of samanodakas. Thus the seventh, eighth, and ninth, &c., descendants of the propositus, and the same descendants of every collateral line up to that of the sixth ancestor, are called samanodakas. Every person, be he ascendant or descendant, or collateral, who can satisfactorily prove, as I said above, that he is descended from a common ancestor, and that he belongs to the same gotra, is a samanodaka.

Principle of the order of succession among them the same as among the sapindas.

The order of succession among the *samanodakas* is regulated exactly in the same way as among the sapindas : "The rule of propinquity is effectual, without any exception, among the samanodakas as well as other relatives, when they appear to have a claim to the succession."[1] The nearer line will exclude the line more remote, and a nearer kinsman will exclude a remoter kinsman in the same line.

II. Bandhus.

Bandhus succeed on failure of gotraja-sapindas.

In default of *gotraja* kinsmen, the succession devolves on bandhus :

"On failure of gentiles," says the Mitakshara, "the cognates are heirs. Cognates are of three kinds,—related to the person himself, to his father,

[1] Mitakshara, II, 3, 4.

Lecture XIII.

or to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.'

"Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance; on failure of them, his father's cognate kindred, or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."[1]

Bandhus, in the language of the Mitakshara, are sapinda relations not belonging to the same *gotra* or family as the deceased proprietor.[2]

In other words, bandhus are those persons who are related by blood, as sapindas to the deceased, *on the female side.* Bandhus then are cognate sapindas.

They are the cognate sapindas,

A descendant of a female of the same family to which the deceased belonged is a bandhu of the deceased. The descendant of a daughter's daughter of the same family to which the deceased belonged is

[1] Mitakshara, II, 6, 1. [2] *Ibid*, II, 5, 3.

also a bandhu of the deceased. A sapinda kinsman related through his mother, is a bandhu of the deceased. A sapinda relation connected through his father's mother, or through his mother's mother, is also a bandhu of the deceased.

LECTURE XIII.

A person then comes within the definition of a bandhu, if he can show that he is related to the deceased through *a female*, and that he is a sapinda of the deceased. There must be *at least one* female between the given person and the deceased; and we will presently show that (in the case of bandhus *ex parte paterna*) there cannot be more than *two* females between them. If there are two females (on the father's side), these two again must be related as mother and daughter to each other.

or sapinda relations through *a female*.

On failure of agnate kinsmen, cognate sapindas take the heritage. But no cognate sapinda can inherit the property unless he can show that not only is he a sapinda of the deceased, but that the deceased also was related to him as a sapinda.[1] In other words, in order to determine whether a person is entitled to succeed to the late owner as a bandhu, it is necessary to see whether they are related as sapindas *to each other*, either directly through themselves, or through their fathers and mothers. This may appear to be a truism at first sight; but a

Test of reciprocal sapindaship.

[1] Mitakshara, II, 3. 3-4; Manu, IX, 187; Amritakumari Devi v. Lakhi Narayan Chuckerbutty, 10 Weekly Reporter, Full Bench, 76; Umaid Bahadur v. Udoi Chand, I. L. R., 6 Calc., 119.

87

Lecture XIII.

little consideration will show that it does not necessarily follow that because a person is a sapinda of another, the latter is a sapinda of the former.

The following illustration will make this clear :—

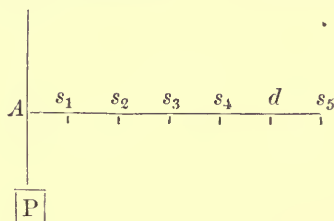


Illustration.

A is the father of the deceased proprietor. s_1, s_2, s_3, and s_4 are the successive male descendants of *A*. *d* is s_4's daughter. s_5 is her son. Let me remind you now that the sapinda-relationship reaches to the *sixth* degree in the father's line, and to the *fourth* degree only on the mother's line (excluding the deceased and his common ancestor). s_5 is six degrees removed from the father of the deceased ; therefore s_5 is a sapinda of the late owner. But *A*, the father of the deceased, is in the mother's line of s_5, and he is beyond the fifth degree commencing from s_5. *A*, therefore, is not a sapinda of s_5 within the meaning of the definition.

Mitakshara's list of bandhus not exhaustive.

Bandhus, according to the Mitakshara, are, as I said above, of three classes,—related to the person himself, related to him through his father, or through his mother.[1] It has now been settled beyond ques-

[1] Mitakshara, II, 6. 1.

tion, by the highest judicial authority, that the list of bandhus given in the Mitakshara *is not exhaustive*, but simply *illustrative* of the proposition that there are three classes of bandhus (*Girdharilal Roy* v. *The Government of Bengal*,[1] *Amrita Kumari*

LECTURE XIII.

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[1] *Privy Council, 7th July*, 1868.

GIRDHARILAL ROY *v.* THE GOVERNMENT OF BENGAL.

The facts on which the determination of this appeal depends are few and undisputed. Woopendro Chunder Roy, the owner of the zemindari and other property in dispute, died, on the 7th of August, 1860, an infant and unmarried. He was of a family which had formerly come from the Upper Provinces, and though settled in Lower Bengal, where the zemindari is situated, is admitted to have retained the ceremonial and other law of its original habitat. There is, therefore, no dispute that any question touching the succession of Upendro Roy is determinable by the Law of Inheritance current at Benares.

On Woopendro's death, the appellant, as the nearest male relative surviving him, performed his *sradh*, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the zemindari on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the brother of his grandmother *ex parte paterna*, or, to use the phraseology of the Mitakshara, his father's maternal uncle; and, accordingly, at the time of this application for mutation of names, some question, whether the appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a pundit, which he had procured through the Registrar of the High Court, determined to recognize the title of the appellant, who, accordingly, was put into possession, or left in possession, of the property, recorded as proprietor of the zemindari in the Collector's books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

In 1863, the Government authorities appear to have changed, for reasons which have not been explained, their view of the appellant's title; and on the 3rd of August in that year, the suit out of which the appeal has arisen was commenced against him in the name of the Government of Bengal, as representing the Crown, for the recovery of the real and personal property of Woopendro, on the allegation that, upon his death, it had escheated, for want of heirs, to the Crown.

By a decree dated 30th of September, 1874, the Zillah Judge dis-

LECTURE XIII. *Devi* v. *Lakhi Narayan Chuckerbutty*[1]). "The text of the Mitakshara[2] does not purport to be an ex-

missed the suit, holding that the Government was not entitled to oust the appellant. The precise grounds of his judgment it is unnecessary to examine.

On appeal to the High Court, this decision was reversed by two of the Judges of that Court. And the present appeal has been preferred against their decree.

The points ruled by the judgment of the High Court were:—

1*st.*—That the Government was not estopped by the acts of its officers in 1861, when the appellant applied for and obtained the mutation of names, from bringing this suit.

2*nd.*—That, upon the true construction of the section in the Mitakshara, which will hereafter be considered, the appellant, as the maternal uncle of the father of the deceased, was excluded from the class of 'bandhus' capable of inheriting; and that, consequently, as between him and the Government, he had no title to the property sued for.

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, *viz.*, whether, under the law current at Benares, the appellant has not a title to inherit the property preferable to the claim of the Government by escheat; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the 6th section of the 2nd chapter of the Mitakshara. The absolute exclusion of the father's maternal uncle from the list of possible heirs, for which the respondents contend, can rest on no other ground.

Mr. Forsyth, indeed, argued strongly against the right of the appellant to inherit on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well founded? There is evidence of the family-priest and others, that the appellant did in point of fact perform the *sradh* of Woopendra, and he seems, in the judgment of the priest, properly to have performed that function in the absence of any nearer kinsmen. It is, however, unnecessary to determine whether this act of the appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of Woopendra at the time of his death had been not the appellant, but a natural-born son of the appellant. It is admitted that, on the strictest interpretation of the Mitakshara, such a person is a bandhu; that the three classes of bandhus must be

[1] 10 Weekly Reporter, Full Bench, 76. [2] II, 6. 1.

haustive enumeration of all bandhus who are capable of inheriting, nor is it cited as such, or for that

LECTURE XIII.

exhausted before the king can take for want of heirs, and therefore that the title of the appellant's son would prevail against the Crown. Now such a bandhu either is competent to perform the sradh of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows, *à fortiori*, that his father, who would have been one degree nearer akin to the deceased, would also have been competent; and that his exclusion from the line of inheritance, if it exists, depends upon some other principle.

It is impossible to read the 2nd chapter of the Mitakshara without remarking the extreme jealousy with which the Hindu law regarded the right of the king to take, on a failure of heirs. The seventh section refuses altogether to recognize that right, where the property was that of a Brahmin. Admitting it as to the property of the other castes or classes, it expressly says, "If there be no relation of the deceased, the preceptor, or on failure of him, the pupil;" and again "if there be no pupil, the fellow-student is the successor." It thus exhausts the relatives, and then interposes between them and the king three classes of heirs not connected with the deceased by blood or participation in funeral oblations. The title of the king is afterwards stated affirmatively thus:—"The king may take the estate of a Kshatriya, or other person of an inferior tribe, on failure of heirs down to the fellow student." So Manu ordains: "But the wealth of the other classes, on failure of all (heirs), the king may take." So far then the law would seem to be clear that the king cannot take the property to the prejudice either of a maternal uncle or a maternal grand-uncle, each of whom is obviously a relation of the deceased. What grounds, then, does the 6th section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs? That section begins by stating broadly, "On failure of gentiles, the bandhus (rendered by Mr. Colebrooke, cognates) are heirs." In this particular section it (Bandhu) may be taken, as defined elsewhere by the Mitakshara itself, to import kinsmen springing from a different family (and therefore opposed to gotraja or gentile) and connected by funeral oblations. From this class the maternal uncle or the father's maternal uncle (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. The author of that treatise (the Mitakshara) goes on to state:—

"Cognates (bandhus) are of three kinds—related to the person himself, to his father, or to his mother, as is declared by the following text," and then follows, as a quotation, a more ancient text (the authorship of which seems, from Mr. Colebrooke's Note, to be uncertain), which

LECTURE XIII.

purpose, by the author of the Mitakshara; it is used simply as a proof or illustration of his pro-

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says :—"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned amongst his mother's cognate kindred."

If, for the determination of the question under consideration, their Lordships are confined to the four corners of the Mitakshara, they would feel great difficulty in inferring, from the omission of "the maternal uncle" and "the father's maternal uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindu in preference of the king. Such an inference, in the teeth of the passages, which say that the king can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all bandhus who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the Mitakshara; it is used simply as a proof or illustration of his proposition that there are three kinds or classes of bandhus; and all that he states further upon it, is the order in which the three classes take, *viz.*, that the bandhus of the deceased himself must be exhausted before any of his father's bandhus can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the Mitakshara, which is not found in that portion of the treatise which was translated by Mr. Colebrooke, but has been translated for the purposes of this suit. The general effect of that passage is to introduce, in the case of a trader dying abroad, a new class of remote heirs, *viz.*, his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes, among bandhus, the maternal uncle. Here then is a passage, written by the author of Mitakshara himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the Mitakshara the question under consideration is at least uncertain. That question, however, is not to be governed by the Mitakshara alone. Adhering to the principles which this Board lately laid down in the *Ramnad case*, their Lordships have no doubt that the Viramitrodaya, which by Mr. Colebrooke and others is stated to be a treatise of high

position that there are three kinds or classes of bandhus, and all that he states further upon it is the order in which the three classes take, *viz.*, that

authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School.

After stating that the term *sakulya*, or distant kinsmen, found in the text of Manu, comprehends the three kinds of cognates, the commentator goes on to say,—"The term cognates (*bandhus*) in the text of Jogisvara (or Yajnavalkya) must comprehend also the maternal uncles and the rest; otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity—a doctrine highly objectionable." The learned counsel for the respondents remarked that this passage of the *Viramitrodaya* goes no further than to affirm the right of a maternal uncle, and that it says nothing of a maternal granduncle. But to say nothing of the use of the term "and the rest," the text is at least an authority for the proposition that a maternal uncle is a *bandhu*. The maternal uncle of the father is, therefore, a *bandhu* of the father, and it is admitted that failing the *bandhus* of the deceased, the *bandhus* of the father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted Pundits; it seems also to make the law of the Benares School consistent, on the point in question, with that of Bengal: and the concurrence of opinions of Mitra Misra, the author of the "Viramitrodaya," with Jimutavahana, the author of the "Dayabagha," is not unimportant, since they are stated by Mr. Colebrooke (Preface, page viii) to differ on almost every disputed point of Hindu law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of bandhus in the text quoted in the Mitakshara, is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of Bengal in the case of *Amritakumari* v. *Lukhi Narayan Chuckerbutty*; the question under consideration must, therefore, be held to be an open one, even in the Courts of India.

Their Lordships then have come to the conclusion that, according to the law by which this case is to be governed, the appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and, therefore, without adopting the reasons given for his judgment, they think that the Zillah Judge did right in dismissing the suit (2 Suth. P. C. R., 160).

LECTURE XIII.

the bandhus of the deceased himself must be exhausted before any of his father's bandhus can take," and the latter must be exhausted before the bandhus through his mother are entitled to the inheritance.

Three descriptions of bandhus.

We should ascertain then who are his own bandhus, who are his father's bandhus, and who are his mother's bandhus.

The text of the Mitakshara referred to above gives us a clue to them. They are to be found in the owner's own family, which is also that of his father, in his mother's family, in his father's mother's family, and in his mother's mother's family.

(1) The deceased's own; (2) his father's; and (3) his mother's.

The heritable right will accrue to a cognate sapinda of the deceased, if (1) the former be in the latter's descending line ; (2) if he be in the deceased owner's father's family ; (3) if he be in the late proprietor's maternal grandfather's line; (4) in his father's maternal grandfather's line ; (5) in his mother's maternal grandfather's line.[1]

In order to determine then whether a person is a heritable cognate sapinda of the propositus, "it is necessary to see whether they are related as 'sapindas' to each other, *either* directly through themselves or through their mothers and fathers."[2]

In other words, the right of inheritance will accrue to a *bandhu*, if the late owner and the person claiming the heritable rights are *sapindas of each other*,

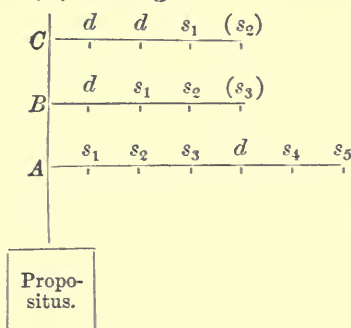
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[1] Umed Bahadur *v.* Udai Chand, I. L. R., 6 Calc., 119.
[2] *Ibid.*

either (1) directly through themselves, or (2) through their fathers, or (3) through their mothers.

LECTURE XIII.

Illustration by a genealogical tree.



In the table above *A*, *B*, *C* are paternal ancestors of the deceased. s_1, s_2, s_3, &c., are male descendants of *A*, *B*, *C*. *d* represents a daughter.

s_4 and s_5 are sapindas of the deceased, because both of them are within six degrees from the paternal ancestor, *A*, of the deceased. But the late owner and s_4 are not sapindas of each other, because *A*, a maternal ancestor of s_4, is *not* within four degrees from him. Similarly the deceased and s_5 are not *heritable* sapindas of each other (though the propositus is commonly known as a sapinda of s_5 'by frog's leap').

Again *B* and *B*—s_3 are not heritable sapindas of each other, "either through themselves or through their mothers and fathers;" and consequently the deceased and *B*—s_3 are not each other's sapindas. They are not each other's sapindas connected in such a manner that the heritable right may accrue to *B*—s_3, because the propositus is not a descendant of the line of the

LECTURE XIII.

maternal grandfather, either of B—s_3, or of his father, or of his mother.

Similarly, the propositus and C—s_2 are not sapindas to each other, either through themselves or through their father, or mother.

Heritable right determined by the criterion of reciprocal sapindaship.

In treating of gotraja-sapindas, I have explained to you that *mutual* sapindaship is the great criterion of heritable right. Unless a person can show that he and the deceased are sapindas of *each other*, he cannot be in the line of heirs for want of mutuality between him and the deceased. This quality of correlation is an absolutely necessary condition by which the heritable right of a given person is determined. If it can be shown that the propositus and the given person are each other's sapindas, then this reciprocal relation is the ground upon which the inheritance devolves upon the claimant. If you wish to know whether a cognate kinsman of the late owner can legally claim the heritage, find out whether they are each other's sapindas, "either directly through themselves or through their fathers and mothers." If you are satisfied that this reciprocal relation exists between them, then the claimant, in absence of nearer heirs, may take the heritage.

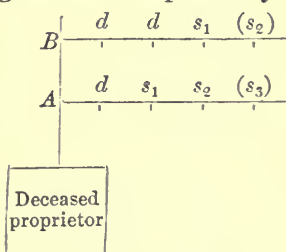
In finding out the heritable bandhus, then, you must always bear in mind, as I have repeatedly said, that the sapinda-relation reaches to the seventh degree in the father's line, and to five degrees only in the mother's line ; and that there must be *mutual*

sapindaship between the deceased and the claimant. The rule of mutuality virtually determines the heritable right of bandhus. It limits the general principle that sapindaship embraces seven generations in the father's line, and five in the mother's line. These two rules act and react upon each other, and by their joint action fix the limits of the heritable right of bandhus.

LECTURE XIII.

The doctrine applicable to the bandhus.

It may sometimes happen that the deceased owner and the claimant are sapindas of each other, and yet the latter is not an heir of the former. The following diagram will explain my meaning:



A and *B* are the father and grandfather of the deceased proprietor, *d* represents a daughter, and s_1, s_2, &c., the cognate male descendants of *A* and *B*. *A* and *A*—s_3 are sapindas of each other; and *B* and *B*—s_2 are also sapindas of each other. Though mutual sapindaship exists in these two cases—both *A*—s_3 and *B*—s_3 being only four degrees removed from the common ancestor—they are not entitled to the heritable right. The reason of their exclusion is, that the deceased was *not* in the line of the maternal grandfather, of either *A*—s_3, of his father, or of his mother. The deceased was in the line of *A*—s_3's

Hypothetical case of a sapinda not being an heir.

LECTURE XIII.

father's father's maternal grandfather's line. In the case of $B—s_2$, the deceased was in his father's mother's maternal grandfather's line. $A—s_3$ and $B—s_2$ are thus too remote to inherit.

If you admit that two kinsmen must be sapindas of each other when one of them is an heir of the other, the conclusion is irresistible, that the Mitakshara and the Viramitrodaya, in declaring that the following persons—

I.—
1. Father's sister's son,
2. Mother's " "
3. *Maternal uncle,*
4. Maternal uncle's son,

II.—
5. Father's father's sister's son,
6. " mother's " "
7. " *maternal uncle,*
8. " maternal uncle's son,

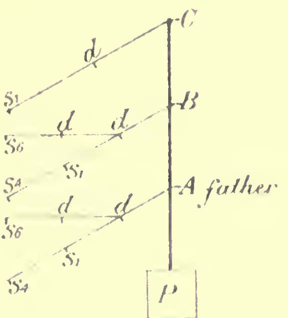
III.—
9. Mother's father's sister's son,
10. " mother's " "
11. " *maternal uncle,*
12. " maternal uncle's son,

are heirs as bandhus, have recognized also the following kinsmen—

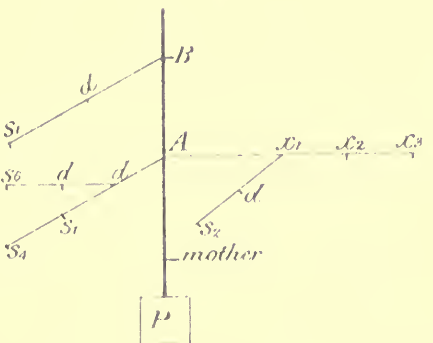
I.—
1. Maternal grandfather's son's son,
2. " " daughter's son,
3. Father's daughter's son,
4. Paternal grandfather's daughter's son,

II.—
5. Maternal grandfather's son's son's son,
6. " " daughter's son's son,
7. Father's daughter's son's son,
8. Paternal grandfather's daughter's son's son,

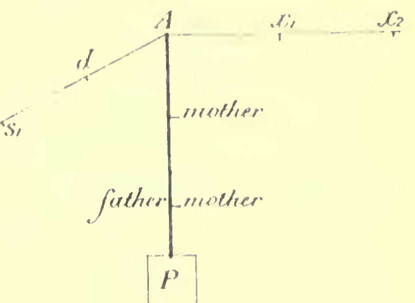
BANDHUS
Ex parte paterna.



BANDHUS
Ex parte materna.



FATHER'S & MOTHER'S
BANDHUS.



Lecture XIII.

Lecture XIII.

III.—
- 9. Maternal grandfather's son's daughter's son,
- 10. " " daughter's daughter's son,
- 11. Father's daughter's daughter's son,
- 12. Grandfather's " " "

as cognate sapindas. As bandhus these kinsmen must be held to be entitled to inherit.

If we classify now all the *bandhus*, who are expressly and impliedly mentioned by the Mitakshara and the Viramitrodaya, we shall find (see annexed Table) A—s_1, s_4, s_6, B—s_1, s_4, s_6, and C—s_1 among bandhus *ex parte paterna*; A—x_1, x_2, x_3, s_1, s_2, s_4, s_6, and B—s_1 among bandhus *ex parte materna*; and A—x_1, x_2, s_1 among father's and mother's bandhus.

If you carefully examine again the texts of the Mitakshara, in which the sapinda-relationship has been defined,[1] you will observe that in one place[2] the author has expressly mentioned the maternal grandfather *and his father*, and the maternal uncle *and his son*, as sapindas; and in another place[3] he has indicated also the *three* immediate maternal ancestors and their *four* descendants as sapindas.

You will thus observe that no less than *thirty-four* kinsmen have been declared as bandhus by the Mitakshara and the Viramitrodaya; and, by following "the principles of exposition" contained in the Mitakshara itself, we easily find out the other cognate sapindas who are entitled to heritable rights.

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[1] Mitakshara, I, 52, 53. [2] *Ibid*, 52. [3] *Ibid*, 53.

LECTURE XIII.

Let us now bring together all the texts of the Mitakshara upon which the heritable right of the bandhus is based, and by which their order of succession is regulated:

1. On failure of *gotrajas* or gentiles, bandhus are heirs.[1]

2. A bandhu is a *cognate sapinda.*[2]

3. The sapinda-relationship reaches to the *seventh* degree in the paternal line; and to the *fifth* degree in the maternal line (including the deceased in both cases).[3]

4. The nearest *sapinda* is entitled to the property of his deceased *sapinda*-kinsman.[4]

[The nearest blood-relation inherits, if he and the deceased were sapindas of each other.]

" Nor is the claim in virtue of propinquity restricted to sapindas, but it appears from this very text (of Manu) that the rule of propinquity is effectual, without any exception, in the case of samanodakas, as well as other relatives, when they appear to have a claim to the succession." [5]

5. " Bandhus are of three kinds—related to the person himself, to his father, or to his mother.

Here, by reason of near affinity, the bandhus of the deceased himself are his successors in the first instance; on failure of them, his father's bandhus; or, if there be none, his mother's bandhus." [6]

[1] Mitakshara, II, 6. 1.
[2] II, 5. 3.
[3] I, 53,
[4] Manu, IX, 187.
[5] II, 3. 3-4.
[6] II, 7. 1-2.

The following rules are founded upon the texts quoted above :

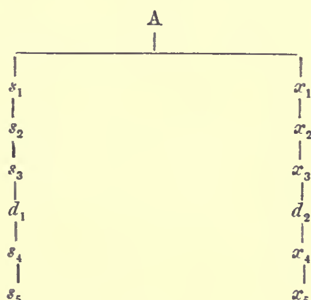
Bandhu is a cognate sapinda within four degrees.

I. A *bandhu* is a cognate sapinda within *four* degrees, counting (1) from the deceased himself, in ascent or descent ; (2) from any one of the four immediate ancestors of the deceased.[1]

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[1] This definition does not embrace what is rather uniquely called 'sapindaship by frog's leap.' (Mandúkapluti Sápindya.)

The propositus and the daughter's son of the third agnate descendant, who is related through the mother, are not sapindas of each other, the former being beyond the fifth degree. But the propositus and the daughter's grandson, mentioned above, are sapindas of each other, the former being within seven degrees. Thus, of two kinsmen who are descended in two different lines from the same ancestor, the fathers are not sapindas of each other, while their sons are sapindas of each other 'by frog's leap.' (Nirnaya Sindhu, 236 ; Dharma Sindhu, III, 506.)



In the diagram given above, *A* is the common ancestor, s_1 and x_1 are his sons ; s_2 and x_2 are his grandsons, &c. d_1 and d_2 are the daughters of s_3 and x_3 respectively : s_4 and x_4 the sons of these daughters, are not sapindas of each other. But their sons, s_5 and x_5, are sapindas of each other 'by frog's leap.'

The propositus again is not a sapinda of the fifth ancestor's, or his son's, daughter's son ; but he is a sapinda of their sons. Among father's maternal kinsmen the fifth and sixth agnate descendants of the maternal ancestors are not sapindas of the father of the propositus ; but are called, by a fiction, sapindas of the propositus himself.

The question is, whether the kinsmen who are known as sapindas 'by frog's leap' are in the line of heirs. By the strict letter of the law they

LECTURE XIII.

The word 'ancestors' includes here—

1. Ancestors of the deceased *ex parte paterna.*

2. Ancestors of the deceased *ex parte materna.*

3. Ancestors of the father of the deceased *ex parte materna.*

4. Ancestors of the mother of the deceased *ex parte materna.*

It should be particularly noted that, in counting the degrees from the deceased, or from a common ancestor, neither the deceased, nor the common ancestor, should be included in the counting.

You will thus easily perceive that a person is entitled to succeed as a *bandhu*—

1. If he is a cognate sapinda within *four* degrees, counting from, but exclusive of,

a. The deceased himself (in the descending line).

b. Any one of the first four paternal ancestors of the deceased.

2. If he is a maternal ancestor, or the descendant of a maternal ancestor, within four degrees—

c. Of the deceased himself.

d. Of his father.

e. Of his mother.

---

may perhaps be entitled to the inheritance. But if we have regard to the spirit of the principles which regulate succession, such kinsmen should *not* be recognized as heritable bandhus. As the sons of bandhus,—who derive their heritable rights through their fathers,—are more remote from the propositus than their fathers, if the fathers are excluded, the sons also should be excluded. "It is extremely improper," says the Viramitrodaya (Vira., III, vii, 5), "to give the heritage to the sons and to exclude from succession their father, though nearer in the degree of affinity" (2 Suth. P. C. R., 163). What Mitra Misra means to say is, "either exclude both the father and the son or give the heritage to both the son and the father. You cannot give it to the son and exclude the father; if you exclude the father you must exclude also the son."

II. The right of inheritance accrues to a bandhu, if the late owner and the person claiming the heritable right were related as sapindas to each other, either directly through themselves, or through their mothers or their fathers. LECTURE XIII.

In other words, a heritable bandhu is a cognate *sapinda* within four degrees, counting from—

1. The deceased in ascent or descent.
2. Deceased's paternal ancestor within four degrees.
3. Deceased's maternal ditto ditto.
4. Deceased's father's maternal ditto ditto.
5. Deceased's mother's maternal ditto ditto.

N.B.—The word '*five*' is to be substituted for 'four' in the case of *father's bandhus.* If the deceased or his ancestor be related through father's mother, then *five* degrees, instead of 'four,' should be counted in both directions. Thus grandson's daughter's grandson is related to the deceased (or his paternal ancestor) through father's mother. He is, therefore, a heritable *bandhu*. This is true not only among the cognate sapindas *ex parte paterna*, but also in the line of the deceased's father's maternal ancestors. We shall thus have five additional *bandhus* among cognate sapindas *ex parte paterna*, and seven in the line of father's maternal ancestors:

b—s_3's son		
A—s_3's ,,		
B—s_3's ,,	}	Bandhus *ex parte paterna.*
C—s_3's ,,		
D—s_3's ,,		

LECTURE XIII.

C; C—x, x_2, x_3, y }
A—s_3's son } Father's bandhus.
B—s_3's ,, }

All others will be excluded.

III. Rule of exclusion—

1. The cognate *descendant* of each of these classes is excluded from inheritance when (i) the deceased, or (ii) deceased's ancestor, does not belong to—

a. His maternal grandfather's line.
b. His father's ditto.
c. His mother's ditto.

2. Cognate *ascendant* of the deceased is excluded from inheritance when *he* does not belong to—

a. The deceased's maternal grandfather's line.
b. The deceased's father's ditto.
c. The deceased's mother's ditto.

The effect of the last rule is, that it excludes from inheritance the great grandson of the daughter and the grandson of a daughter's daughter in *all* the different classes mentioned above. The son of the deceased's daughter's grandson (son's son), for example, is excluded, because the deceased was not *his* maternal ancestor, nor was the deceased the maternal ancestor of his father or of his mother, but of his father's father. Similarly, the son of a daughter's daughter's son is excluded, because the deceased was the maternal ancestor of his father's

mother. These kinsmen are too remote for the purposes of inheritance.

LECTURE XIII.

Construction of synoptic tables.

If you remember then the definition of a heritable *bandhu* given above and this rule of exclusion, you will easily be able to construct the three following Tables of Succession :

The tables explained and illustrated.

The first table (*a*) shows the bandhus *ex parte paterna* of the late owner himself. In the first table (*b*) are to be found his bandhus *ex parte materna.*

The second table shows his father's bandhus; and the third table shows his mother's bandhus. These are the three kinds of bandhus, who have been declared by the Mitakshara to be entitled to the heritage in default of *gotraja* kinsmen.

Table I (*a*): cognate sapindas *ex parte paterna.*

In the first table (*a*), *A*, *B*, *C*, *D* are the first four immediate paternal ancestors of the deceased. *d* represents a daughter, and s_1, s_2, s_3, &c., represent her male descendants. x_1, x_2 represent the agnate descendants of the deceased, or of a common ancestor.

Five classes of bandhus in the descending line.

There are five classes of bandhus in the descending line—

1. The daughter's son, and the latter's son.
2. The son's daughter's son, and the latter's son.
3. The grandson's daughter's son (and the latter's son.)
4. The daughter's daughter's son.
5. The son's daughter's daughter's son.

LECTURE XIII.

There are seven such persons.

Here are altogether *seven* (eight)[1] persons who are bandhus of the deceased. They are cognate sapindas of the deceased, and the deceased was a sapinda of each of them. Inasmuch as, therefore, the deceased and these persons were each other's sapindas, the right of inheritance accrues to all these seven (eight) cognate kinsmen:

1. Daughter's son.

1. The daughter's son is a heritable bandhu, because he is only *two* degrees removed from the deceased, and the deceased was his maternal grandfather.

2. Daughter's son's son.

2. His son is also a heritable bandhu, because he is *three* degrees removed from the deceased, and the latter was the former's father's maternal grandfather.

3. Son's daughter's son.

3. The son's daughter's son is a heritable bandhu, because he is only *three* degrees removed from the deceased, and the latter was the former's maternal great grandfather.

4. Son's daughter's grandson.

4. His son is a heritable bandhu, because he is only *four* degrees removed from the deceased, and the latter was the former's father's maternal great grandfather.

5. Grandson's daughter's son.

5. The grandson's daughter's son is a heritable bandhu, because he is only *four* degrees removed from the deceased, and the latter was the former's maternal great great grandfather. (S^5_a. His son is

[1] Wherever the alternative number appears in brackets, it means that the grandson's daughter's grandson is to be added in each line to the original number.

a heritable bandhu, *though* he is *five* degrees removed from the deceased, because the latter is related to the former as his *father's bandhu.*)

6. Daughter's daughter's son.

6. The daughter's daughter's son is a heritable bandhu, because he is only *three* degrees removed from the deceased, and the latter was the former's mother's maternal grandfather.

7. Son of the daughter of the son's daughter.

7. The son's daughter's daughter's son is a heritable bandhu, because he is only *four* degrees removed from the deceased, and the latter was the former's mother's maternal great grandfather.

No others are bandhus with rights of inheritance in the descending line.

No others besides these seven (eight) are entitled to the bandhu relationship for purposes of inheritance. We have shown already, that the daughter's great grandson and the daughter's daughter's grandson are excluded from this heritable relationship.

Seven classes of heritable bandhus in the lines of each of the four immediate ancestors.

The remoter descendants of these seven (eight) persons are not heritable bandhus for want of mutuality between them and the deceased. The late owner and these remoter descendants are not each other's sapindas for heritable purposes.

You will similarly find that there are only seven (eight) heritable bandhus in the lines of each of the four immediate paternal ancestors of the deceased, *viz.*, his father, grandfather, great grandfather, and father's great grandfather.

Four parallel ascending lines.

You will perceive that there are only four parallel ascending lines. You cannot have any more. Try one more, and you will find that a cognate sapinda of

LECTURE XIII.

that line is *not* a heritable bandhu within the meaning of the definition given in the Mitakshara. Suppose *E* is the *fifth* ancestor in whose line you wish to know whether there is a bandhu who would be entitled to succession. *E's* daughter's son is the first cognate kinsman whom you meet. He is only two degrees removed from the fifth paternal ancestor of the deceased; he is, therefore, a sapinda of the deceased. But the deceased was the *fifth* descendant of the maternal grandfather of the given person. As he (the deceased) was, therefore, *more than* four degrees removed in the *mother's* line of the given person, the deceased was *not* recognized as *his* sapinda. Inasmuch as, therefore, the deceased and the given person were not each other's sapindas, *E's* daughter's son is not a *bandhu* capable of taking the inheritance. Every other cognate kinsman, in *E's* line, or in any other line above this, is, in this manner, you will find, excluded from inheritance.

In the ascending and descending lines the bandhus are altogether thirty-five in number.

We have thus found out *thirty-five* (forty) cognate sapindas or bandhus in Table I (*a*) who are capable of taking the inheritance in default of *gotrajas*. Now let us determine the order of succession among them.

"Nor is the claim in virtue of propinquity," says the Mitakshara, "restricted to sapindas; but, on the contrary, it appears from this very text—' To the nearest sapinda the property of the deceased sapinda next belongs'—that the rule of propinquity is effectual, *without any exception*, in the case of samanodakas

as well as other relatives, when they appear to have a claim to the succession." Propinquity then regulates the order of succession not only among *gotrajas*, but also among *bandhus*. The rule is, that the nearer excludes the more remote. We know also that the cognates related to the person himself exclude his father's *bandhus*, and the latter exclude the *bandhus* through the mother.

LECTURE XIII.

Succession among them regulated by the law of propinquity.

Of the *thirty-five* (forty) bandhus in this table (I *a*), let us see in what degree of kindred each of them stood to the deceased.

Illustrations of the principle.

The following diagram will show you at a glance the degree of kindred in which each bandhu stood to the deceased, and the *nature* of the relationship of each to the late owner.

Let the *numerical figures* represent the number of degrees by which the deceased (or his ancestor) is removed from each bandhu.

Let *ob* represent a person's own bandhu ; *fb* his father's bandhu ; *mb* his mother's bandhu.

First, in the descending line, the deceased is—

2 *ob* of s_1
3 ,, ,, s_2
4 ,, ,, s_3

3 *fb* ,, s_4
4 ,, ,, s_5
(5 ,, ,, s_a^5)
3 *mb* ,, s_6
4 ,, ,, s_7

LECTURE XIII.

Similarly, in the line of *A* also, *A* is—

2 *ob* of s_1
3 ,, ,, s_2
4 ,, ,, s_3

3 *fb* ,, s_4
4 ,, ,, s_5
(5 ,, ,, s_a^5)

3 *mb* ,, s_6
4 ,, ,, s_7

Law of gradation of three classes of bandhus for heritable purposes. (1) one's own bandhu, (2) his father's, (3) and his mother's arranged in order of preference.

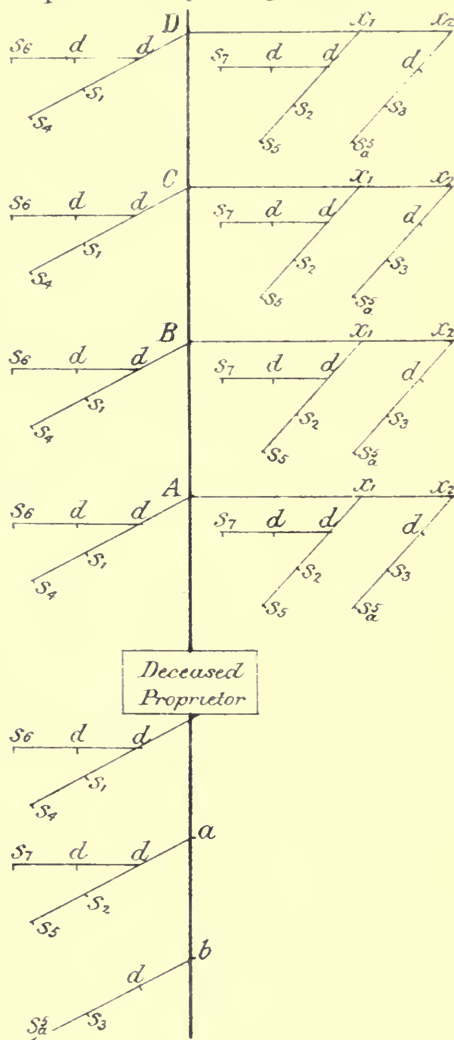
Just in the same way the exact relationship and propinquity of the deceased with regard to each bandhu can be easily ascertained.

We know that those persons to whom the deceased was related as their *own bandhu*, will be preferred to those to whom the deceased was their *father's bandhu*, and the latter will be preferred to those to whom the deceased was their *mother's bandhu*. We know also that, according to the general principles regulating the order of succession in the Mitakshara, the kinsman—to whom the deceased was related as his own bandhu—of a nearer line will exclude a similar kinsman of a remoter line. The same remarks apply to those kinsmen to whom the deceased was related as their *father's bandhu*, or their *mother's bandhu*. All other things being equal, the nearer line excludes the line more remote;

Elucidation of the law with examples.

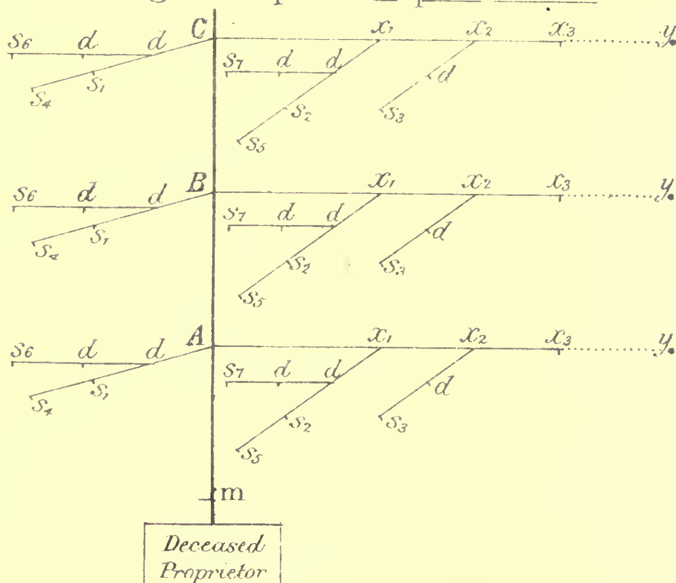
I(a) MITAKSHARA—BANDHUS.

Owner's Cognate Sapindas Ex parte paternâ.

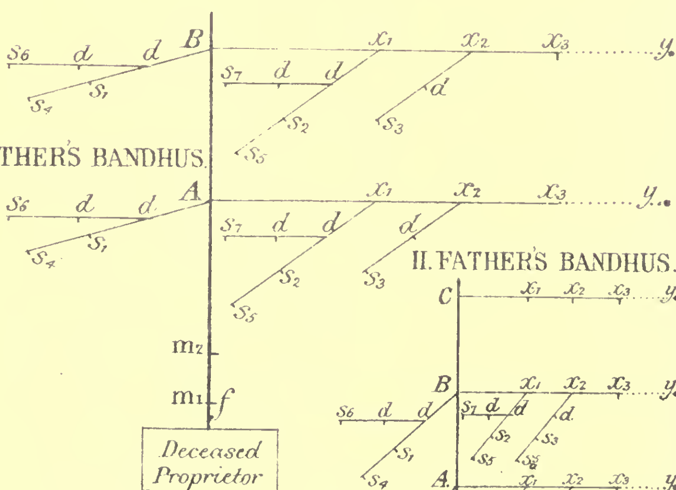


I(b). MITAKSHARA–BANDHUS.

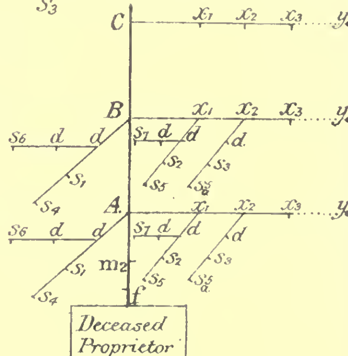
Owner's Cognate Sapindas Ex parte maternâ.



III. MOTHER'S BANDHUS.



II. FATHER'S BANDHUS.



and the nearer kinsman of the same line excludes the kinsman more remote. LECTURE XIII.

We thus see that s_1, s_2, s_3 of the descending line are first entitled to succession in order. These are the late owner's daughter's son, his son's daughter's son, and his grandson's daughter's son. The daughter's son of the deceased is entitled to special privileges, and he is placed as an heir very high even among the agnates. His claims, therefore, need not be discussed here at all.

In default of these, the heritage goes to s_1, s_2, s_3 of *A's* line. These are the deceased owner's father's daughter's son, his brother's daughter's son, and his nephew's daughter's son.

The succession then devolves on s_1, s_2, s_3 in *B's* line.

On failure of them, s_1, s_2, s_3 in *C's* line are heirs.

After them the right of inheritance accrues to s_1, s_2, s_3 in *D's* line.

It will be noticed that s_1, s_2. s_3 of the descending line of *A's* line, of *B's*, and of *C's* line, are the very persons who are competent to present *parvana* oblations to the deceased. If, instead of applying the rule of affinity in regulating the order of succession, we had applied the principle of religious benefits, the results would have been exactly the same. This is an additional proof that the doctrine of religious benefits and the doctrine of affinity are not materially different from each other. They are insepar-

LECTURE XIII.

ably connected with each other, and when properly applied they yield the same results.

On failure of the kinsmen to whom the deceased was related as their own *bandhu*, s_4, s_5 (and s^5_a) of each line are successively heirs.

When these are exhausted, the inheritance next goes to s_6 and s_7 of each line in order of proximity.

We thus see that, in the descending line and in the paternal lines, the order of succession is fixed in the following manner:—

1. Sons of the daughters of the family.
2. Sons of daughters' sons.
3. Sons of daughters' daughters.

Table I (*b*): cognate sapindas *ex parte materna.*

The bandhus in Table I (*a*) have now been exhausted. We now come to the cognate sapindas *ex parte materna.*

Here *m* represents the mother of the deceased; *A*, *B*, *C* represent her father, grandfather, and great grandfather; x_1, x_2, x_3 represent the agnate descendants of *A*, *B*, &c.; *y* represents the son of x_3, the great great grandson of each line.

Arranged in three parallel lines.

You will observe that there are only *three* parallel lines in this table. *C*, the maternal great great grandfather of the deceased, is removed *four* degrees from the late owner. The sapinda-relationship cannot go beyond four degrees (excluding the deceased) in his mother's line.

Their order of succes-

The order of succession among bandhus *ex parte*

materna is slightly different from that prevailing among the bandhus *ex parte paterna*. The three agnate descendants of the maternal ancestors first claim the inheritance. The deceased was related to them as their own bandhu *ex parte paterna*. They are preferred, therefore, to those to whom the deceased was related as a bandhu *ex parte materna*. y, the fourth agnate descendant, however, who, you will observe, is placed after dotted lines in the table, will not succeed after x_3 in each line. I will tell you why he will not do so.

LECTURE XIII.

sion slightly different from that of the previous class.

The deceased, it is true, was related to him as his *own bandhu* four degrees removed; the deceased, therefore, was a bandhu of y *ex parte paterna*. Now the deceased was related to s_1, s_2, and s_3 also as their *own bandhus ex parte materna*, two, three, and four degrees removed respectively from them. But the deceased was a bandhu of y *ex parte paterna*. It would appear then that, according to the general principle regulating succession in the Mitakshara, y should exclude s_1, s_2, s_3. We have seen, however, that, according to the Viramitrodaya and other standard works highly esteemed in the Benares School, the doctrine of religious efficacy should be applied in regulating the order of succession. In obedience to this rule, therefore, y should be excluded from succession till all the kinsmen presenting *parvana* oblations to the maternal ancestors of the deceased have been exhausted.

Though based on the spiritual principle.

LECTURE XIII.

The way in which it is fixed.

Among the bandhus *ex parte materna* the order of succession should be fixed in the following manner:

1. The three agnate descendants of maternal ancestors.

2. Sons of daughters of the family.

3. The fourth agnate descendant in each line.

4. Sons of daughter's sons.

5. Sons of daughter's daughters.

In other words—

A—x_1, A—x_2, A—x_3,
B—x_1, B—x_2, B—x_3,
C—x_1, C—x_2, C—x_3,

take the heritage successively in order of proximity.

Then come in s_1, s_2, s_3 in each line as heirs.

s_4, s_5 in each line, follow them; and s_6, s_7 exhaust the list.

Tables II & III: father's and mother's bandhus.

We now come to the second and third tables—to the father's and mother's bandhus of the deceased.

Here m_1 represents the mother of the deceased; f represents his father; and m_2 represents the mother of the late owner's father or mother.

A and B represent the maternal grandfather and great grandfather of both the father and mother of the deceased owner. C in Table II represents father's maternal grandfather's grandfather.

As regards father's *bandhus* in Table II, there are three parallel lines and four agnate descendants in each line. The cognate descendants in C's line, who

trace their connection through their mother, being more than *five* degrees removed from the deceased, are excluded.

Two parallel lines.

With regard to mother's bandhus in Table III, you will observe that there are only two parallel lines. *B* is four degrees removed from the deceased, and the sapinda-relationship cannot go further in this case.

Order of succession the same as in Table I (*b*) or as among bandhus *ex parte materna*.

The order of succession among the father's and mother's bandhus will be similar to that among the bandhus *ex parte materna* of the deceased.

In expansion of the Mitakshara's list which enumerated only nine.

The Mitakshara enumerated only nine bandhus. With the daughter's son, there were only *ten* kinsmen who claimed the title of bandhu for nearly four centuries. The Viramitrodaya added *three* more—the maternal uncle of the deceased, of his father, and of his mother. No addition was made to these bandhus for another three hundred years. Even the sister's son, for a very long time, was denied the heritable right. He came repeatedly before the British Courts to claim his right. He was sent away every time as a pretender and an interloper.[1] It was the sister's son, however, who, strong in his right, would not be discouraged, and could not be put down. He again made his appearance before the Calcutta High Court, and the Cour theld that, "according to the Mitakshara,

Effect of judicial decisions.

[1] 1 Weekly Reporter, 74; 7 Weekly Reporter, Privy Council; Sevestre's Con. Mar., 460; 1 Mad., 85.

LECTURE XIII.

he could inherit the property of his maternal uncle."[1] It was declared almost simultaneously by the Privy Council that the list of bandhus in the Mitakshara was not exhaustive. The archaic laws of the Mitakshara are not suited to the advanced state of Hindu civilization at the present day; they must be modified and altered to suit the present circumstances of the country. The ball of progress is rolling on, and new principles of exposition, discovered by the light of modern juridical science, must be applied to find out the latent meaning of the words of the Mitakshara. My words may be stigmatized as heretical. Our lawyers will not admit that anything is said or done by the present administrators of Hindu law which is not in accordance with the spirit of the ancient code. The present legislators simply throw light, they say, upon what was left doubtful, or what is obscure in the ancient law. I have nothing to say against such observations. What I simply intend to say is, that the law will change as the circumstances of the country change; and new doctrines and new principles will replace those which governed the law of succession in former times. The law of progress will necessitate these changes. The ball is continually rolling on, and nothing can arrest its progress at the present day. That the new laws must be based upon the old laws can never admit of the shadow of

And the law of progress and evolution.

[1] 10 Weekly Reporter, Full Bench, 76.

a doubt. Order and progress are inseparably connected with each other. The present state of society is an outcome of the past, and the future will be an inevitable result of the present. What we only wonder at is, that people are determined to deny the existence of the tide of progress in Hindu law. They will persist in declaring that the growth of Hindu law has been arrested, and that there is no vitality in the ancient codes of the country. It may be true that the old legal treatises are not adapted to the present exigencies of Hindu society, but to say that the *spirit* of Hindu law is dead, is to show an utter ignorance of the law of social progress in India.

To return from this digression:

Can a brother's daughter's son succeed under the Mitakshara law? *Doorga Bibee* v. *Janaki Prasad.* *Giridhari Lal Roy* v. *The Government of Bengal.* *Amritakumari Devi* v. *Lakhi Narayan Chuckerbutty.*

In the case of *Doorga Bibee* v. *Janaki Prasad*,[1] the question was, whether a brother's daughter's son should succeed as heir, under the Mitakshara, in the absence of nearer heirs. This question, said the Calcutta High Court, "is settled by the decisions of the Privy Council in the case of *Giridhari Lall Roy* v. *The Government of Bengal*, and of a Full Bench of this Court in *Amritakumari Devi* v. *Lakhi Narayan Chuckerbutty*, where it was held, that the enumeration of bandhus in II, 6. 1 of the Mitakshara is not to be considered as exhaustive. That being so, there is no ground for saying that a brother's daughter's son cannot inherit in the absence of any nearer heir."

[1] 10 Beng. Law Reports, 34.

LECTURE XIII.

Sister's daughter's son.

Umed Bahadur v. Udoi Chand.

In the case of *Umed Bahadur* v. *Udoi Chand*,[1] it was *held* that the son of sister's daughter is entitled to inheritance.

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[1] I. L. R., 6 Calc., 119.

This case was referred to a Full Bench by Sir Richard Garth and Mr. Justice Prinsep on the 8th March, 1880, with the following opinion :—

"A question of Hindu law has arisen in this case, which, being of general importance, we think should be referred to a Full Bench.

"The plaintiff in the suit, Udoi Chand, claims certain property as heir to his father Puran Chand, under a conveyance from one Mussamut Nobo Bohu, the widow of Mooktar Bahadur, to whom the property originally belonged, and for the purposes of the question at issue, it must be taken that the plaintiff has a right to recover the property from the defendant, unless the latter can show that by Hindu law he is the heir of Mooktar Bahadur.

"The defendant claims to be the heir of Mooktar Bahadur through Mussamut Juswant Koer, his maternal grandmother : his mother having been the daughter of Juswant Koer, and Juswant Koer having been the sister of Mooktar Bahadur.

"He contends that, standing in this relation to Mooktar Bahadur, he is his bandhu, or cognate, and as such his heir within the meaning of the rule laid down in the Mitakshara, chap. 2, sec. 5, verses 3 and 6, and in sec. 6.

"It is contended on his behalf that the term 'sapinda' in the latter portion of verse 3 has been mistranslated by Mr. Colebrooke to mean 'connected by funeral oblations,' whereas its proper meaning is 'connected by ties of consanguinity.'

"If Mr. Colebrooke is right, the defendant could not be a bandhu of Mooktar Bahadur, although, on the other hand, Mooktar Bahadur would be the bandhu of the defendant.

"The defendant relies upon a passage in the untranslated portion of the Mitakshara (Achar Adhyaya) quoted by Mr. Justice Dwarka Nath Mitter in his judgment in the case of *Amritakumari Devi* v. *Luckhinarayan Chuckerbutty*, in 2 Bengal Law Reports, Full Bench Rulings, pp. 33, 34.

"See also a passage from Parasara Madhava, quoted at page 33 of the same judgment; the case of *Giridhari Lal* v. *The Government of Bengal*, 12 Moore's Indian Appeals, page 448 ; and Mayne's Hindu Law and Usage, sec. 436, &c., where the question is thoroughly discussed.

"We therefore refer the question for the opinion of the Full Bench,—

"Whether the defendant is the heir of Mooktar Bahadur."

The following is the unanimous decision of the Full Bench :

We think that the question referred to us should be answered in the affirmative.

If the defendant is a 'sapinda' of Mooktar Bahadur within the mean-

The question, whether a sister's son should succeed in preference to the mother's sister's son, came before the

LECTURE XIII.

Sister's son in competition with mother's sister's son.

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ing of verse 3, sec. 5 of chap. 2 of Mitakshara, there cannot be any doubt that he is a bandhu of the deceased.

The 'sapinda' relationship has been defined by the author of the Mitakshara in Acharkanda (chapter treating of Rituals). The following is a translation of the passage as given in West and Bühler, pages 174 and 175:—"He should marry a girl who is non-sapinda (with himself). She is called his sapinda who has (particles of) the body (of some ancestor, &c.) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda-relationship) to his paternal grandfather and the rest, because, through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likewise the grandson stands in sapinda-relationship to his maternal grandfather and the rest through his mother. So also (is the nephew) a sapinda-relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise does he stand in (sapinda-relationship) with paternal uncles and aunts and the rest. So also the wife and the husband (are sapinda-relations to each other), because they together beget one body (the son). In like manner brother's wives also are (sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body (*i. e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them).

Therefore one ought to know that, wherever the word 'sapinda' is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent."

Verse 53.—"After the fifth ancestor on the mother's, and after the seventh on the father's, side. On the mother's side in the mother's line after the fifth, and the father's side in the father's line after the seventh, (ancestor), the sapinda-relationship ceases; the latter two words must be understood; and therefore the word 'sapinda,' which on account of its (etymological) import, (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *pankaja* which (etymologically means 'growing in the mud' and therefore would apply to al plants growing in the mud, designates the lotus only) and the like; and thus the six ascendants beginning with the father, and the six descendants beginning with the son, and

LECTURE XIII.

Ganesh Ch. Roy v. Nilkomul Roy.

Calcutta High Court in the case of *Ganesh Chunder Roy* v. *Nilkomul Roy*. Mr. Justice R. C. Mitter,

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one's-self (counted) as the seventh (in each case), are sapinda-relations. In case of a division of the line also, one ought to count up to the seventh (ancestor) including him with whom the division of the line begins (*e. g.*, two collaterals, A. and B., are sapindas, if the common ancestor is not further removed from either of them than six degrees), and thus must the counting of the (sapinda-relationship) be made in every case."

If in verse 3, sec. 5, chap. 1, the author of the Mitakshara used the word 'sapinda' in the meaning which he has given to it in the passage cited above, the translation of Mr. Colebrooke of the verse in question is not correct. Having taken great pains in accurately defining the word 'sapinda' in the beginning of his work, and having said in clear words in the passage in question that "one ought to know that *wherever the word sapinda is used*, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent," it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well understood rule of construction amongst the authors of the Institutes of Hindu law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated.

It has been said that, in the chapter on inheritance, the word 'pinda' has been used by the author of the Mitakshara in the sense of 'funeral cake.' No passage has been cited to support this contention. On the other hand, it appears abundantly clear from the passages to which we refer below, that the author has used the word 'pinda' in the sense of 'body' wherever the word 'sapinda' occurs.

In verse 6, sec. 5 of chap. 2, the author, after laying down that 'samanodakas' succeed after 'sapindas,' proceeds to support this rule by citing an authority, thus,—"Accordingly Vrihat Manu says;—'The relation of the sapinda ceases with the seventh person, and that of samanodakas extends to the fourteenth degree,' or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by 'gotra' or the relation of family name."

In commenting upon slokas 252 and 253 of Yajnavalkya, the author in Acharkanda (Chapter on Rituals) cites this text of Vrihat Manu, and says with reference to it, that "sapinda-relationship with the father does not arise by reason of the connection through funeral cakes, but through the connection of particles of one body." In this part of his work, the author treats of the subject of the funeral cakes. If here he assigns to the word 'sapinda' occurring in the text of Vrihat Manu before mentioned, the meaning which he has assigned to it in the definition given above, it is but reasonable to hold that, in verse 6, sec. 5 of chap. 2, he has used the word 'sapinda' in the same sense.

in delivering the judgment of the Court, said : "The question in this case is, whether the plaintiff, who is the sister's son of one Modhu Sudan, is a preferential heir to one Kashinath, who is Modhu Sudan's mother's sister's son. The lower Appellate

LECTURE XIII.

Again, the author, in verse 3, sec. 3, chap. 3, discussing the question whether or not the mother is preferential heir to the father, says :— "Besides, the father is a common parent to other sons, but the mother is not so, and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text, 'To the nearest sapinda the inheritance next belongs.'" Here it is evident that the word 'sapinda' occurring in the quoted text of Manu has been used not in the sense of "connection by funeral cake," but of "connection of particles of one body." Two of the well-known commentators of the Mitakshara, *viz.*, Balam Bhatta and Bissessur Bhatta, the author of Subodhini, in commenting upon this passage, give the same meaning to the word 'sapinda' in the cited text of Manu.

These considerations leave no room for doubt that, in verse 3, sec. 5, chap. 2, the author of the Mitakshara has used the word 'sapinda' not in the sense of "connection by funeral oblations," but of "connection by particles of one body" as defined in Acharkanda (Chapter on Rituals). That this is the case is evident from the fact that some of the enumerated *bandhus* in verse 1, sec. 6 of chap. 2, admittedly do not confer any religious benefit on the deceased, and therefore cannot be said to be connected by funeral oblations with him. Our conclusion upon this point is supported by a decision of the High Court of Bombay, in the case of *Lallubhai Bapubhai* v. *Mankooerbai*, reported at page 422, Indian Law Reports, Bombay Series, vol. ii.

The next question for consideration is, whether the defendant in the case that has been referred to us stands in such a relation to Mooktar Bahadur that they are each other's 'sapindas' as defined by the author of Mitakshara in Acharkanda. The defendant in this case is a descendant three degrees removed from Mooktar Bahadur's father, the common ancestor. *Mooktar Bahadur is the son of the maternal grandfather of the defendant's mother.* Therefore they are related as 'sapindas' to each other. The defendant is a 'sapinda' of Mooktar Bahadur, because he is within six degrees from the common ancestor, *viz.*, Mooktar Bahadur's father; and Mooktar Bahadur of the defendant, because he is the son of defendant's mother's maternal grandfather. In order to determine whether a person is a 'sapinda' of the propositus within the meaning of the definition, it is necessary to see whether they are related as 'sapindas' to each other, either directly through themselves, or

Lecture XIII.

Court has decided this question in favour of the plaintiff. In special appeal it is contended that that decision is against the provisions of the Mitakshara law. We do not think that this contention is correct. It has been decided by a Full Bench of this Court that a sister's son is a *bandhu*,[1] to which class Kashinath, who is the mother's sister's son, also belongs. It is clear that the sister's son confers greater spiritual benefits upon the soul of the deceased than his mother's sister's son. Therefore, according to the general principle of the Hindu law, the plaintiff is a preferential heir to Kashinath. There being no decided cases upon this point, and in the Mitakshara itself the respective positions of these parties not being definitely settled, the general principle of the

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through their mothers and fathers. Take for example the following table for illustration :—

A | C d — D d — E s — F s

B Propositus.

A is the common ancestor ; B, his son, is the propositus. C, a daughter of A ; D, her daughter, both dead. E is the son of D, and has a son F.

Now B and E are sapindas to each other, but not B and F.

Although F is within six degrees from the common ancestor, yet B, not being a descendant of the line of the maternal grandfather, either of F or of his father and mother, they are not sapindas to each other ; but B being a sapinda of E through his mother, they are sapindas of each other. The defendant stands in the same relation to Mooktar Bahadur as E does to B.

Therefore the question referred to us should be answered in the affirmative.

[1] Amritakumari Devi, 10 Weekly Reporter, Full Bench, 76.

Hindu law should be our guide in determining this question. We, therefore, affirm the judgment of the lower Appellate Court, and dismiss the special appeal with costs."[1]

LECTURE XIII.

It is clear that, in the opinion of the Bengal High Court, the principle of religious benefits, in the absence of express words of the Mitakshara, "should be our guide" in determining the order of succession among bandhus.

Mayne on succession among the bandhus according to the Mitakshara law.

"The order of succession among *bandhus* under Mitakshara law," says Mr. Mayne,[2] "is very obscure. Nothing is to be found upon the subject either among text-writers or in precedents, and the principle upon which any case is to be decided is far from clear. If the text of the Mitakshara in which the bandhus are enumerated is to be taken as indicating the order of succession, it will be seen that proximity, and not religious efficacy, is the ground of preference; the first of the three classes contains the man's own first cousins, the second contains his father's first cousins, and the third contains his mother's first cousins. This is corroborated by the next verse, where the author says—'By reason of near affinity, the cognate kindred of the deceased are his successors in the first instance; on failure of them the father's cognate kindred, or if there be none, the mother's cognate kindred. This must be understood

[1] 22 Weekly Reporter, 264.

[2] Mayne's Hindu Law, 494.

LECTURE XIII.

to be the order of succession here intended.' The preference of the father's kindred to that of the mother is in accordance with the general preference of the male line to the female line."

Affinity determines the right, and propinquity the order of succession.

We have seen that the principle upon which the question is to be decided is far from being obscure. The Mitakshara system of inheritance is based on 'affinity,' and the order of succession is regulated by the principle of 'propinquity.' The degrees of propinquity are tested by 'religious merit.' The writers of the Benares School are almost unanimously agreed that affinity determines the heritable right; and propinquinty, based upon religious merit, determines the preferable right.[1] The Mitakshara prefers the male line to the female line—the kinsmen *ex parte paterna* to the kinsmen *ex parte materna*. The cognate sapindas *ex parte paterna*, therefore, should be preferred to the cognates *ex parte materna*. If we simply bear this general principle in mind, it will not be difficult at all to fix the order of succession. Wherever there may be any doubt in the matter, the principle of religious efficacy, to quote the language of the Calcutta High Court, "should be our guide."

Male line preferred to the female.

The principle of religious merit never gives an uncertain answer in such doubtful cases. Almost all the legal treatises of the Benares School have applied this principle whenever the authors were

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[1] Viramitrodaya, II, 1, 23; III, 1, 11.

doubtful as to the exact order of succession among the heritable kinsmen. We cannot do better than follow their example, and our decision is not likely to be wrong.

Father's paternal aunt's son preferred to mother's brother's or her sister's son.

According to the text of the Mitakshara in which the bandhus are enumerated, the late owner's "own cognate kindred" should be preferred to those of the father, and the latter to those of the mother. Now the father's father's sister's son is included among father's bandhus, and the mother's father's sister's son among mother's bandhus. It would seem at first sight that the father's father's sister's son should, according to the Mitakshara, be postponed to the maternal aunt's son, &c., and the mother's father's sister's son to father's bandhus. A little consideration, however, will show that such could not have been the meaning of the Mitakshara. Both father's paternal aunt's son and the mother's sister's son are two degrees removed from a common ancestor. But the common ancestor is an agnate sapinda in one case, and is a cognate sapinda in the other. According to the general principles of succession under the Mitakshara law, a cognate descendant, two degrees removed, of an *agnate sapinda*, should be preferred to a cognate descendant, two degrees removed, of a *cognate sapinda*. It should be remembered, that when we apply the rule of propinquity, we should be careful in noting that the degrees of propinquity are counted in ascending lines not from

LECTURE XIII.

the *propositus, but from a common ancestor from whence the line diverges.* This is the Hindu idea of propinquity, and is materially different from the western idea of 'nearness.' Within a well-defined range, the degrees of sapinda-relationship are allowed to be heritable; and the distance from the common ancestor is the test of propinquity. If the system of computing the degrees of kindred obtaining in the West be applied to the Indian system, it will upset all the principles regulating Hindu succession, and will make confusion worse confounded. The principle of computing these degrees has already been explained to you, and if you apply that principle in the case before you, you will find that, even by the rule of 'affinity' and propinquity, the father's paternal aunt's son should take precedence of the mother's brother, or mother's sister's son.

So is also mother's paternal aunt's son.

The same remarks apply to the succession of mother's paternal aunt's son. He is the cognate descendant, two degrees removed, of a cognate ancestor. The father's maternal aunt's son is also a cognate descendant, two degrees removed, of a cognate ancestor. In the first case, however, the bandhu is connected to the deceased through his mother; in the second case, through grandmother. The mother's line is nearer to the deceased than that of the grandmother. By the rule of propinquity, therefore, the mother's paternal aunt's son is preferred to the father's maternal aunt's son.

Lecture XIII.

Father's maternal aunt's son and his maternal uncle's son exclude the same relations of the mother.

Of the nine bandhus mentioned in the Mitakshara, two are connected through the father, three through the mother, two through the paternal grandmother, and two through the maternal grandmother. When they are arranged in this manner, there cannot be the shadow of a doubt as to their order of succession. "The preference of the father's kindred to that of the mother, is in accordance with the general preference of the male line to the female line."[1] That being so, those that are connected through the father—the father's sister's son, and the father's father's sister's son—are preferred to the bandhus connected through the mother (*viz.*, mother's sister's son, mother's brother's son, mother's father's sister's son). Now, of the bandhus through the mother, paternal grandmother, and the maternal grandmother, the mother's line being nearer than that of the grandmother's line, the bandhus through the mother will exclude those through the grandmother. Of the bandhus through the two grandmothers again, the maternal grandmother's line is, for obvious reasons, more remote than that of the paternal grandmother, and will, therefore, be excluded by the latter. In other words, the mother's maternal aunt's son, and the mother's maternal uncle's son, will be excluded by the father's maternal aunt's son and the father's maternal uncle's son.

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[1] Mayne's Hindu Law, 494.

LECTURE XIII.

Why are the former placed in the second and third series of heirs, their natural place being in the first?

But the question that may be naturally asked is, why should the father's paternal aunt's son and the mother's paternal aunt's son be placed in the second and the third series respectively, when their natural place is in the *first* series ? The question is not easy to answer. We may be able, however, to arrive at a correct solution of the difficulty, if we *carefully* examine the text of the Mitakshara enumerating the bandhus. To my mind, the solution of the difficulty lies in a nutshell. I will explain my meaning.

The Mitakshara, in discussing the heritable right of the bandhus, remarks, that there are three classes of bandhus, who, in default of *gotrajas*, are entitled to the inheritance in order of their proximity to the deceased. In support of this statement, the author quotes the authority of Baudhayana[1] and Vriddha Satatapa[2] to support his statement. In the words of the Mayukha, the text enumerating the bandhus "is intelligible only by taking (the enumerated) paternal and maternal bandhus as being bandhus in reference to succession to property."[3] It follows as a matter of course then that these classes of bandhus are *heirs* to the deceased.

Keeping this fact in mind, let us attempt a re-translation of the text—

"On failure of *gotrajas*, the bandhus are heirs. Bandhus are of three kinds—related (directly) to the per-

[1] Vyavahara Madhava. [2] Balam Bhatta.
[3] V. Mandalik's Vyavahara Mayukha, 83.

son himself *(atma-bandhu)*, through his father *(pitri-bandhu)*, or through his mother *(matri-bandhu)*. It is declared (by the following text) : The atma-bandhus, or cognate kindred related (directly) to the person himself, *viz.*, ' the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, [&c.,] must be reckoned [*as heirs*].'

" [*Like*] the sons of his father's paternal aunt, the *pitri-bandhus*, or bandhus through the father, *viz.*, the sons of his father's maternal aunt, the sons of his father's maternal uncle, [&c.,] must be reckoned [*as heirs*].

" [*Like*] the sons of his mother's paternal aunt, the *matri-bandhus*, or bandhus through the mother, *viz.*, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, [&c.,] must be reckoned [*as heirs*]."[1]

In the text translated above, we have *added three words*. The word ' heirs ' has been added in conformity with the general context of the passage in which the text of the Mitakshara occurs. The words *et cetera* have been added, because there is a consensus of opinion that the enumeration of bandhus is not ' exhaustive.' We have supplied the word *like*, having regard to the general doctrine of the Mitakshara that " proximity is the ground of preference." In every other respect the translation is *literal*.

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[1] Mitakshara, II, 6. 1.

LECTURE XIII.

According to our interpretation of the text, then, the father's paternal aunt's son and the mother's paternal aunt's son are put in by way of illustration only. The former represents the first class of cognates known as "a person's own cognate kindred *ex parte paterna;*" and the latter represents "a person's own cognate kindred *ex parte materna.*" It would mean then, that as a person's own bandhus *ex parte paterna* and *ex parte materna* are heirs, *so* the bandhus through the father and the mother are also heirs.

The addition of the simple word 'like' would give harmony and consistency to the principles of succession enunciated in the Mitakshara. If we add this word, the whole becomes intelligible, and the principle of propinquity becomes universally applicable.

There is another probable explanation of the words "the father's paternal aunt's son" and "the mother's paternal aunt's son," occurring in the second and the third series, instead of in the first.

The first series may be taken to represent the bandhus through the father and the mother. The second series may be taken to represent the *bandhus through the father's paternal and maternal ancestors;* and the third, *the bandhus through the mother's paternal and maternal ancestors.* The members of the first series are heirs in the first instance. In default of them, the members of the second series; and on failure of them,

those of the third. The father's paternal aunt's son is connected directly through the father, and *mediately* through the father's grandfather. Thus he is the owner's own bandhu, as well as a bandhu of his father. He thus bears a double relation. As the owner's own bandhu *ex parte paterna*, the father's paternal aunt's son has already been acknowledged as an heir of the first class. When the members of the first class are exhausted, the only heirs that would remain to be provided for would be the bandhus connected through the paternal grandmother. The father's paternal aunt's son then is included in the second series, simply because he bears a *double* relation. He partakes of the heritable qualities of the first class as well as of the second class.

The same remarks apply to the mother's paternal aunt's son.

This explanation, we must say, cannot be considered to be so satisfactory as the one given by us above. I give it to you, however, simply to show that various conjectures are made to explain the apparent anomaly in the text of the Mitakshara enumerating the bandhus.

West and Bühler on the succession of bandhus.

"Regarding the order in which the *bhinna gotra* sapindas succeed to each other," remark Messrs. West and Bühler, whose opinion in this matter is entitled to considerable weight, "it is difficult to speak with certainty. It would seem, however, that the *nine* bandhus mentioned in the law books ought

LECTURE XIII.

Their conclusion erroneous.

to be placed first."[1] We cannot endorse this opinion. If we do so, the sister's son would be placed after the mother's maternal aunt's son and her maternal uncle's son.

If we place him in this position, we would violate the first principle of the Mitakshara law of succession—the principle, we mean, of proximity or propinquity. To say that the words of another lawyer (Baudhayana) cited by the Mitakshara would be a valid ground for thus dealing severely with so near a kinsman as the sister's son, would imply that the founder of modern Hindu law is capable of acting contrary to the very principle which he was so anxious to establish. Nowhere has the author of the Mitakshara said, that the sister's son and similar kinsmen should be placed as heirs after very remote kindred through the mother. In the very next sentence following the text enumerating the bandhus, the author of the Mitakshara insists upon "the reason of *near* affinity" being applied in regulating the order of succession among bandhus. If "the nine bandhus be placed first," we would not be acting according to the spirit of the Mitakshara law. Well may we pause before we ascribe contradictory opinions to the most logical of all lawgivers. The veterans of Hindu society would look aghast, if you say that the great hermit, from whom all the founders of the modern schools have

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[1] West and Bühler's Hindu Law, p. 203.

learned to lisp their law, states a proposition in one sentence and contradicts it in the next. We strenuously maintain that there is not a single word in the Mitakshara which would imply that any exception whatever was made by him to the universal principle of propinquity. Nay, even if words be found in the Mitakshara which would seem to imply that the author probably intended that "the nine bandhus" should "be placed first," we should say, in the words of Vrihaspati, "a decision must not be made by having recourse to the letter of written codes, since, if no decision were made according to the reason of the law, there might be a failure of justice."

Reason of the law a safer guide than the letter.

III. The Principle of Survivorship.

Before I conclude this Lecture I wish to explain to you the rule of survivorship enunciated by the Privy Council in the *Sivagunga case.*

Doctrine of survivorship enunciated by the Privy Council.

The law of inheritance applies only to separate property. So long as the property is joint and undivided, no member of the joint family can predicate of that property that he, that particular member, has a certain definite share in it. "According to the principles of Hindu law," says the Privy Council, "there is coparcenership between the different members of a united family, and survivorship following upon it; there is community of interest and unity of possession between all the members of the family; and upon the death of any one of them, the others may well take

LECTURE XIII.

by survivorship that in which they had, during the deceased's lifetime, a common interest and a common possession."[1]

Applicable to the joint property of an undivided family.

Thus, where the joint property of an undivided family is enjoyed in its entirety by the whole family, and not in separate shares by the members, one member has not such an interest therein as is capable of being inherited by his heirs. The members of a joint family have a right to participate in every portion of the joint property, but inasmuch as he could not point, during his lifetime, to a particular share which was exclusively his own, he had *no* property, properly speaking, which his heirs might claim as their heritage.

But not to separate property.

"If the property was divided during the lifetime of the deceased, or was separately acquired by him, the other members of that family had neither community of interest nor unity of possession. The foundation, therefore, to take such property by survivorship fails ; and there are no grounds for postponing the widow's right to inherit it to any superior right of the coparceners in the undivided property." Where no formal partition then of the family estate has taken place, the family must be considered joint and undivided, and in such a case a widow cannot succeed to, or retain possession of, her husband's share as against his surviving brothers.[2] Before, however, female heirs can be

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[1] Katama Natchiar *v.* The Rajah of Sivagunga, 1 Sutherland's Privy Council Reports, 520.

[2] 5 Weekly Reporter, 78.

excluded from succession to a husband or father under the Mitakshara law, on the ground that the estate was joint, it must be shown to have been so at the time of his death.[1]

LECTURE XIII.

In the case of *Sadabart Prasad Sahu* v. *Foolbash Koer*,[2] speaking of the mutual relation of the rule of survivorship with the rule of succession by inheritance, Sir Barnes Peacock said: "According to the Mitakshara law, if a member of a joint undivided family dies without a son, and leaving a brother, his widow does not take his share by descent. If he leaves a son, the son takes by descent; but if he leaves only a widow, the survivors take by survivorship, and they hold the property, which they take by survivorship legally and equitably for themselves, and not in trust for the heirs of the deceased. The deceased's heirs have no interest, either legally or equitably, in the share which passes by survivorship to the surviving co-sharers. That the estate survives, and does not pass to the widow by inheritance, has been held by the Privy Council to be the law. They held that, in the absence of a son, the share of a deceased member of a joint family, under the Mitakshara law, does not go to the widow or to the person who would be next heir of the deceased if the widow were not in existence."

Sadabart Prasad v. Foolbash Koer.

The opinion expressed by Mr. Justice Phear in his

Devolution of separate

[1] 6 Weekly Reporter, 101.

[2] 3 Bengal Law Reports, Full Bench, 31.

LECTURE XIII.

and joint property.

Raja Ram Narain v. Pertum Singh.

judgment in the case of *Raja Ram Narain Singh* v. *Pertum Singh*,[1] with regard to the devolution of separate and joint property, is well worthy of notice: "There were some expressions," he said, "thrown out by the Privy Council in the *Tipperah case*,[2] and by some of the learned Judges who gave judgment in the case reported in 9 Bengal Law Reports, 274, which seem to imply that there is a different law of descent in the case of what is termed a separate property from the law of descent in the case of joint property. I do not myself readily accept that law. The distinction between a joint property and separate property under the Mitakshara law appears to me to be simply of a temporary, not of an abiding, character. Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others joint with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it—the property of a new joint family springing from a

[1] 20 Weekly Reporter, 189.

[2] 12 Weekly Reporter, Privy Council, 21.

new root. And it continues to go down by one rule of descent only. Lecture XIII.

"As I understand the matter, there is substantially no difference prevailing in the one case and in the other. It is simply the occurrence of a fresh starting point for a new joint family which makes the distinction between the two cases.

"While the joint family endures, there is, strictly speaking, no question as to succession to the property. The joint family is a corporation in the sense of having a continuous existence, notwithstanding the death of individual members; and it is now settled that, under the Mitakshara law, no individual member of the family has any specific interest in the property, or the power of creating any for himself independently of the other members: he has only a right to insist upon a partition being effected at all. But by the nature of the case, the joint family must commence, and also must end, when it *does* end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family. Thus the Mitakshara law itself does nothing to keep property in the condition of being the separate property of an individual throughout a series of takers, and indeed is hostile to such a state of things.

LECTURE XIII.

"If, however, in any given case property is so situated that it does pass from one taker to another taker just in the same condition as if it were the separate self-acquired property of each of them personally, independently of the family element, then this result, I conceive, can only be brought about, if at all, by the operation of some established custom or authority controlling the general Mitakshara law."

The only thing we insist upon is, that "while the joint family endures, there is, strictly speaking, no question as to succession to the property." The law of inheritance cannot apply; the members of the joint family must enjoy the undivided property *together*, and the rule of survivorship will exclude succession by representation. Inheritance assumes separate property. In a joint family, as I said before, there is "community of interest and unity of possession between all the members of the family," and the law of inheritance has nothing whatever to do with a coparcenership.

Widow excluded by surviving members of the family.

In the case of *Phoolbas Koonwur* v. *Lala Jogeshur Sahoy*,[1] it was held by the Privy Council that, "on the death without issue of a member of a Hindu family joint in estate and subject to the Mitakshara law, his undivided share in the joint family property passes to the surviving members of the joint family, and not to his widows, and cannot be made liable for

[1] Indian Law Reports, 1 Calc., 226.

his debts under decrees obtained against his widows as his representatives." Sir Barnes Peacock, the Chief Justice, in delivering the judgment of a Full Bench of the Calcutta High Court, from which the case was appealed to the Privy Council, remarked: "I think that this property, not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the decree against the widows; that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree, by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of the survivors to the same extent as that to which it would have been made available if the deceased had left a son and the estate had gone to him by inheritance, instead of to the survivors by survivorship."

Debi Pershad v. Thakur Dyal.

In the case of *Debi Pershad* v. *Thakur Dyal*, it was decided by the Allahabad High Court, that "when, in an undivided Hindu family living under the Mitakshara law, a brother dies without leaving issue, but leaving brothers and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on his death to his surviving brothers, but, on partition, the whole estate, including the interest of the brother so dying, is

Predeceased brother's sons succeed along with surviving brothers by right of re-

LECTURE XIII.

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presentation.

divisible; and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grandfather would have taken, had he survived the period of distribution."

The Court, in delivering its judgment, said:

"The peculiar incidents of the joint property of an undivided family are survivorship and the right of representation. When once the principle of survivorship is admitted, it is difficult, in the absence of express law, to limit its operation. The principle of survivorship taking effect on the common fund, in which no one of the members of the family has any distinct share, operates not to augment the rights of any particular class of the coparceners, but to enlarge the shares which upon partition would fall to the lot of every one of the members. In effect, by the operation of this rule, the share to which a coparcener dying without issue would have been entitled, does not pass by descent, but *lapses*. The right of representation operates at the time of partition to secure an equal partition of the inheritance between the several sons of the common ancestor and the issue to the third generation of sons who have died leaving issue surviving the period of distribution, such issue taking *per stirpes* the share of their father or forefather. 'Should a younger brother die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle

or from his uncle's son, and the same proportionate share shall be allotted to all the brothers according to law. Or if that grandson be also dead, his son takes the share; beyond him the succession stops.'[1]

"The consequence of the doctrine, that a right in the paternal ancestral estate is acquired by birth, is, that there is in fact no devolution of the property from one owner to another; but that, as each son comes into being, he forthwith acquires a right which would, on partition, reduce the shares of the other sons, and which, should he not survive partition and have issue, his son or grandson would take by substitution, and which, if he dies before that period, will simply *lapse*. There being no devolution of the property, the laws of descent are inapplicable.

"If it be held that the interest which a coparcener acquires by birth does not lapse on his death without male issue, but passes under the law of succession to heirs other than direct issue, who presumably do not exist, and other than his widow, whose title is expressly denied, it follows that the right would devolve not on brothers only, but on those heirs also who are entitled to succeed in priority to brothers. Thus, a daughter, a daughter's son, a mother, or a father, might, on partition, claim the share of a deceased coparcener. *No instance is cited in which such a claim has been allowed.*"[2]

[1] Katyayana cited in Vyavahara Mayukha, IV, 4, 21.
[2] Indian Law Reports, 1 All., 105.

LECTURE XIII.

Bhimul Dass v. Choonee Lall.

This ruling was followed by the Calcutta High Court in the case of *Bhimul Doss* v. *Choonee Lall.*[1] The case was referred to a Full Bench.

The question referred was, whether, in an undivided Hindu family governed by the Mitakshara law, if a brother dies leaving no issue, but leaving brothers and orphan nephews, who are members of the joint family, his interest in the family property passes on his death to his surviving brothers alone, or to all the surviving members of the joint family; and in case of a partition, is that the principle according to which the respective shares of the persons entitled to succeed to that interest are to be apportioned?

The Chief Justice, Sir Richard Garth, in delivering the judgment of the Full Bench, said:

"This case raises precisely the same question which was decided by a Full Bench of the Allahabad High Court in the case of *Debi Pershad* v. *Thakur Dyal;* and we feel bound, having regard to the weight of authority, to decide in accordance with that decision, that, under the circumstances stated in the case, the interest of the deceased brother in the family property ought, in the event of a partition, to be divided between his nephew and his two brothers in equal shares.

"This point was distinctly decided by the Sudder Dewany Adawlut, in the year 1802, in the case of

[1] Indian Law Reports, 2 Calc., 379. See also Bhugwan Golap Chund *v.* Kriparam Anundram, 2 Bor., 29.

Duljeet Singh v. *Sheomunook Singh*,[1] and Mr. Colebrooke was one of the Judges who decided it. The same rule has been laid down since by other authorities, and is recognized by the Lords of the Privy Council in the case of *Katama Natchiar* v. *The Raja of Sivagunga*.[2]

LECTURE XIII.

"We do not find any authority conflicting expressly with those decisions; and we are, therefore, of opinion, that the judgment of the Lower Court is right, and that this special appeal should be dismissed with costs."

This case virtually decided that, in joint families governed by the Mitakshara law, the principle of survivorship obtains until partition; and that, upon a partition taking place, the distribution amongst the different members of the family is to be made not according to the ordinary Hindu rule of heirship, but *per stirpes*.[3]

View of the Madras High Court.

According to the Madras High Court "the limit of the 'co-heirs' must be held to include undivided collateral relations, who are descendants in the male line of one who was a coparcener with an ancestor of the last possessor. Collateral kinsmen answering the above description have interests which pass *inter se* by right of survivorship, and a widow's right as heir is excluded when any of such collateral kinsmen survive her husband. The governing

[1] 1 Select Rep., 59.
[2] 9 Moore's I. A., 539.
[3] Rajnarain Singh v. Heralall, Indian Law Reports, 5 Calc., 142.

LECTURE XIII.

principle of the rule is coparcenary survivorship, which precludes alike the right of the widow and every other member of the family, who has no right to the enjoyment of the estate before the death of the possessor.

"The sound rule to lay down with respect to undivided or impartible ancestral property is, that all the members of the family, who, in the way pointed out, are entitled to unity of possession and community of interest according to the law of partition, are co-heirs, irrespective of their degrees of agnate relationship to each other; and that, on the death of one of them leaving a widow and no near *sapindas* in the male line, the family heritage, both partible and impartible, passes to the survivors or survivor, to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property."[1]

Conclusions.

It is clear then, that if the deceased coparcener leaves a son, his interest in the joint property goes to his son as his heir. In default of sons, grandsons get it, and on failure of the latter, the succession devolves on the great grandson. In case there are fatherless grandsons, and great grandsons whose father and grandfather are dead, the rule *per stirpes*

[1] Yenumula Gavuri Devamma *v.* Y. Ramandora, 6 Mad. High Court Rep., 93.

will apply, and the fatherless grandson, and the great grandson whose father and grandfather are dead, will share with their uncle and grand-uncle (grandfather's brother) respectively the interest which the deceased coparcener possessed in the undivided property.

Heirs by descent.

The son, the grandson, and the great grandson take by descent. The heritable limit, as you know very well, is reached in the great grandson. The descendants of the great grandsons are not in the line of heirs. "If a coparcener should die, therefore, leaving no nearer descendant than a great great grandson, then the latter would, no doubt, be excluded at once from inheritance, and from partition by any nearer heirs of the deceased, as for instance, brothers and their sons; but where there has not been such an interval as to cause a break in the course of lineal succession, neither has there been an extinguishment of the right to a partition of the property in which the deceased was a co-sharer in actual possession and enjoyment, each descendant in succession becomes co-owner with his father of the latter's share, and there is never such a gap in the series as to prevent the next from fully representing the preceding one in the succession."[1]

By survivorship.

If the deceased leaves no male issue, his interest descends no further. It *lapses*, and the surviving coparceners take the share of the deceased by the rule of survivorship, and hold it wholly, both legally

[1] Moro Vishvanath v. Ganesh Vithal, 10 Bom. H. C. R., 444.

LECTURE XIII.

and equitably, for themselves. By the rule of survivorship, the female heirs, and those who claim through them, are entirely excluded. Thus the widow, the daughter, the daughter's son, the mother, and similar heirs are wholly left out. If a partition takes place on the death of the propositus, the joint property, in which the interest of the deceased has *lapsed*, is divisible among all the coparceners *per stirpes*. "The partition should be in every respect an equal partition, subject to the qualification that those who take by representation take only the share which he whom they respectively represent would have taken had he survived partition."[1] Equal shares will thus be given to the descendants of each son of the former owner in whom the different lines of ascent coincide. In other words, equal shares will be given to the sons of the common ancestor, who was the last holder of the property; and these shares will again be divided in the several lines *per stirpes*.

When there has been a partition.

Mistaken notions regarding survivorship.

There are people who imagine that the simple effect of the rule of survivorship is to exclude the female heirs and those who claim through them; *otherwise*, they believe, the ordinary rules of succession apply, and the nearer kinsmen exclude the more remote. This is a great mistake. The principle of survivorship provides, that, in an undivided family, the descent—if such a term could be used at all—is

[1] Indian Law Rep., 1 All., 113.

in coparcenary,[1] and the ordinary rules of succession which govern the devolution of separate property cannot be applied in determining the mutual rights of coparceners in a joint family. On the death of a coparcener, his interest is merged, as it were, in the common interest, and no single person is, but *all* the survivors are, benefited by the *lapse* of the deceased's share in the undivided property. The participation is not individual, but communistic. The interest of the deceased does not go to one individual, but to the different classes of individuals composing the family. The different classes of individuals again take the interest not in order of their proximity to the deceased, but simply in right of their being members of the same joint undivided family. Thus the rule of survivorship overrides the ordinary rules of succession, and *all* the surviving coparceners are, as it were, the heirs of the deceased.

The survivors take *per stirpes.*

Another mistake also should be guarded against. The share of the deceased in the joint property belongs wholly, both legally and equitably, to *all* the survivors, it is true; but it should be distinctly understood that the survivors do *not* take the interest *per capita*. It some times happens that the property is to be divided among persons, four, five, and six degrees removed from the common ancestor;[2] and you should know that the property in all cases is

[1] 15 W. R., P. C., 10.

[2] Girwurdharee Singh *v.* Kulapaul Singh, 4 S. D., 12.

LECTURE XIII.

divisible *per stirpes* among the different branches of the family. There are, as a rule, different classes of coparceners who compose an undivided family. The share of the deceased is divided *equally* among those classes which are of equal degree. The whole family in fact is divided into its primitive elements. On division taking place, it is generally found that several lines proceed from a common ancestor. The share of the deceased is first divided equally among these lines. It is then found that there are several groups in each line. The proportion of the original share which each line received is then again divided according to the number of groups in each line; and the division goes on in this manner till the share of each individual member of each line is correctly defined. It does not matter whether a person claiming a share is more than *four* degrees removed from the acquirer or *original owner* of the property sought to be divided; but it should be distinctly understood that the person claiming a share is never entitled to it, if he is more than *four degrees* removed from the *last holder*. He has, you must know, an indubitable right to a share if he is within *four* degrees from the *last holder*, however remote he may be from the original owner of the property sought to be divided;[1] but if he is more than *four degrees* removed from the *last holder*, he is excluded.

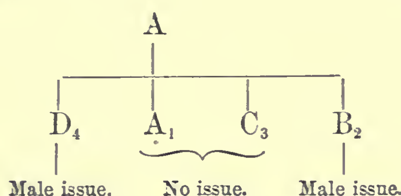
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[1] 10 Bom. H. C. R., 465.

In the case of *Debi Pershad* v. *Thakur Dyal*, for example, there were four brothers. The fourth brother died leaving sons, who were the plaintiffs in this suit. Then the first and the third brother died without issue. Finally, the second brother died leaving sons who were defendants in the suit. The principal issue raised by the suit was, whether the plaintiffs were entitled, on partition, to a moiety of the undivided immoveable estate of the family, or to one-fourth.

LECTURE XIII.

Debi Pershad v. *Thakur Dyal*



Had the ordinary rules of succession governing the devolution of *separate* property applied here, the nephews would have been excluded by the second brother, who survived the first and the third brother. Had the first and the third brothers left *separate* estates, there can be no doubt that their surviving brother would have succeeded to them in preference to, and to the exclusion of, their nephews. In that case, the share of the plaintiffs would, probably, have been only one-fourth of the entire property—the share which their father would have got on partition of the property. But the ordinary rules of succession will not apply here. The case is to be governed by the law of survivorship. By the death of the first and the third brothers, their shares lapsed. In the eye of

LECTURE XIII. the law, they never existed at all. So long as they lived they enjoyed profits; but, by their death, the devolution of the property is not in the least affected. We may leave them out of consideration altogether. Leaving out the first and the third brother then, we find that there are *two* different classes of individuals preceding from a common ancestor. The first class consist of the representatives of the fourth brother, and the second class of the second brother. Suppose there are *five* members of the first class and *ten* of the second class. Had the rule *per capita* applied, the property would have been divided into *fifteen* equal shares. But the rule *per capita* will not apply; the partition will be made by the rule *per stirpes*. The share of the plaintiffs then in this case is a moiety of the estate. If the five sons of the fourth brother wished again to know to what proportion of this moiety each of them was entitled, this moiety would be divided into five parts, and each of them would get one part.

Had any of the brothers in the above case died leaving a fatherless grandson, or a great grandson, whose father and grandfather were dead, the same rule *per stirpes* would have applied, and the right of representation would have secured to the grandson and the great grandson of the deceased brother the share which their grandfather or great grandfather would have obtained had he survived the period of distribution.

LECTURE XIII.

This is the principle of survivorship enunciated by the Privy Council in the *Sivagunga case.*

Professor Goldstücker's view of the Privy Council judgment.

Professor Goldstücker, whose profound knowledge of Hindu law was universally esteemed, speaking of the judgment of the Privy Council in this case, says, that "if it be relied upon as a precedent, it would materially alter the whole Hindu law of inheritance in one of its vital points."

Its incorrectness proved by authorities cited.

"There are two principles," the judgment says, "on which the rule of succession, according to the Hindu law, appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship."

The judgment pertinently asks:—"If the first of these principles (the spiritual principle) were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate."

Dharma Sindhu.

It will be remembered that, according to *Dharma Sindhu*, the standard authority in ceremonial matters in the Benares School, "though the property of an undivided or a reunited brother is inherited by his brother, the right to perform the s'raddha belongs to the widow alone. On failure of the widow, the brother is competent to perform the s´raddha of an undivided or a reunited brother." The *Nirnaya Sindhu*

LECTURE XIII. also lays down the same dictum. It is but right to tell you, here, that the *general practice* is, that, in an undivided family, the brother excludes the widow in the performance of the s′raddha rites.

The law, however, is clear that, in an undivided family, the widow, even in presence of the brother, is competent to perform the *s′raddha* of the deceased. The s′raddha which the widow performs is *ekoddishta*, or individual, and not *parvana*, or ancestral.

Dayabhaga.

The Dayabhaga distinctly says, that the succession of "the widow, &c.," "takes effect under express texts."[1] Thus the succession of females is quite exceptional, and is not founded on the ordinary rule of spiritual benefits.[2] Their succession cannot be explained on the strict principle of religious efficacy. The widow performs the individual *s′raddha* on failure of male issue, it is true; but so long as there is an oblator who is competent to present *parvana* cakes, the widow and the other female heirs cannot claim the inheritance. It would be wrong then to apply the spiritual principle in accounting for the succession of female heirs.

According to Professor Goldstücker, the spiritual benefit *alone* regulates all cases of succession, and it is unnecessary and unreasonable to introduce "a second principle, hitherto unknown," which would entirely alter this law so far as undivided families

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[1] Dayabhaga, XI, vi, 11.

[2] Gunga Pershad Kur *v.* Shumboo Nath Burmun, 22 W. R., 393.

are concerned. "There is only one principle," says he,—"the principle of spiritual benefits, and the second (the principle of survivorship) does not exist at all."[1]

LECTURE XIII.

Mitakshara.

The learned Professor is of opinion that the principle of survivorship is 'unknown' to Hindu law. If we turn to Chapter II, 9. 4 of the Mitakshara, we find the following sentence :—"On failure of male issue, the coparcener *alone* shall take the inheritance, and *not the widow*, &c." Does not the Mitakshara clearly say here that, in a reunited family,—which is essentially a joint and undivided family,—the female heirs should be excluded, and the survivors should take the interest of the deceased coparcener? The great commentator of the Mitakshara, Visvesvara Bhatta, thus elucidates, in his Madana Parijata, the point referred to by his master : "Another coparcener shall take, even in presence of (the deceased's) widow, the property of a person who died without leaving sons or grandsons. The singular number in 'coparcener' is not intended to be significant. Hence *all* coparceners,[2] if there be more than one, shall take the property, dividing it among themselves, and shall give maintenance to the widow." The

Madana Parijata.

[1] Goldstücker's Lit. Rem., Vol. II, 165—168.

[2] तस्य मृतस्य पुत्रपौत्ररहितस्य धनं पत्न्यां विद्यमानायामपि अपरः संसृष्टी गृह्णीयात्। संसृष्टीत्येकवचनमविवक्षितम्। अतः संसृष्टिनो वा विभज्य गृह्णीयुः। तस्याः पत्न्याश्च पोषणं कुर्य्युः। Madana Parijata, MS., 273a.

LECTURE XIII.

Madana Parijata then goes on to say, that a reunited family may consist of the father, uncles, and brothers; and, in case the widow's pregnancy was unknown at the time of distribution, the coparceners shall deliver the deceased's share to a son subsequently born, &c.

Here we find two of the greatest authorities of the Benares School insisting upon the principle of survivorship in determining the mutual rights of coparceners on the death of one of their body.

Viramitrodaya.

We find the author of the Viramitrodaya endorsing the same opinion,—"Just as in the case of partition among undivided co-heirs, so also among those that are reunited, if any one die before partition is made, his sons shall take and divide amongst themselves their paternal share. But if any one of the reunited co-heirs die without leaving male issue, then the succession to his estate would devolve upon a (surviving co-heir)."[1]

Principle of survivorship the only relic of the past.

We can quote passages from a host of other writers of the Benares School, as well as of other schools, to show that the principle of survivorship was perfectly known, and acted upon by the Hindu lawgivers. In an undivided family, the principle of survivorship overrides the rule of spiritual benefits. The principle of survivorship in a joint family is the only relic of the past. The history of the great struggle between

[1] Viramitrodaya, IV, 2, 4.

communism and individuality must not be forgotten. There was a time when *separate* property was unknown; and those who died left not a trace behind, and his place was occupied by others better able to serve the corporate family, and enjoy the privileges of the joint family. Wherever the ancient institution remains, the rule of survivorship is preserved intact, and individual rights, as distinct from corporate rights, are totally ignored.

LECTURE XIII.

LECTURE XIV.

PRINCIPLES OF SUCCESSION UNDER THE DAYABHAGA LAW.

I.



Dayabhaga — Its principle of inheritance: spiritual benefit — Manu's dictum as to 'nearness of kin' interpreted by the author of Dayabhaga — Criterion of the superiority of benefits derivable from oblations — Three modes of conferring benefits on the deceased — Competency to perform exequial rites key to the rule of inheritance — Preferential right of the performer of *parvana* rites — Persons competent to perform *parvana s'raddha* — Relative value of their offerings — Presentations by the agnate superior to those by the cognate descendants — The doctrine of participation — Participation in offerings to the common ancestor — Preferable right of father's descendants over grandfather's — Nephew's claim prior to uncle's — Brother's grandson excludes paternal uncle — Recapitulation — Rule of proximity of kinship to the proprietor — Illustrations — Sapinda — Baudhayana's definition: partaker of undivided oblation — Sapinda-relationship extends to seven generations — Two requisites of the relationship — Illustration of the rule as regards son — Grandson — Great grandson — Daughter's, son's daughter's, and the grandson's daughter's son do not come under the above definition — Father — Brother — Uncle — Grand-uncle's grandson — Summary — Baudhayana's definition, though elaborate, is incomplete — It does not include kinsmen related through females — Jimutavahana's definition — Persons allied by a common oblation, without reference to the stocks to which they belong — Connection by funeral offerings the only requisite — Cognate and agnate sapindaships; their distinctive marks — Genealogical scheme of sapindas — In the father's line — In the mother's line — 'Agnates' higher than 'cognates' — Summary — Calcutta High Court's definition of *sapinda*-relation — Limited to the *sagotras* — Definition including the *sagotras* and *bhinnagotras* — Dayabhaga's list of heirs not exhaustive — Specific mention of daughter's son, father's, grandfather's, and great grandfather's daughter's son as cognate kinsmen — Three more heirs named in the Dayakrama Sangraha — Brother's daughter's son — Uncle's daughter's son — Grandfather's brother's daughter's son — Jagannatha's extension of the list of heirs — Enumeration of cognate sapindas — Order of their succession — As propounded in the Dayabhaga — By Vijnanesvara and his followers — Claims of daughter's son as heir first recognized by Jimutavahana — Why do not the cognate sapindas of father, grandfather,

and great grandfather inherit after the agnate descendants — Agnate and cognate sapindas of a nearer line exclude the sapindas of a remoter line — Illustrations — Extracts from the Dayabhaga — In support of the heritable rights of cognate sapindas — In preference to an agnate sapinda of a remoter line — Sister's son — Grandfather's and great grandfather's daughter's son — They inherit in the relative order of the funeral oblations — According to Manu the agnate and cognate descendants are on the same footing — The order of their succession being determined by the following rule, — offerer of oblation to a near ancestor is preferred to one presenting the same to a remote ancestor — Daughter's son: sense of the term as used in the Dayabhaga — "Sons of the daughters of the family" — Omission of certain cognate kinsmen as heirs in the Dayabhaga how accounted for — Their position — Not precisely stated in the Dayabhaga — Have they been excluded by Jimutavahana from their appropriate places — The question answered in the negative — Son of son's daughter, and son of grandson's daughter, successively come in as heirs after the daughter's son — Though not mentioned by Jimutavahana — Order of cognate sapindas as given in the Dayabhaga examined by the Calcutta High Court — *In Govind Prosad v. Mahesh Chunder* — Paternal grandfather's great grandsons preferred to brother's daughter's son — *In Guru Govind Saha v. Anund Lal Ghose* — Four propositions laid down — High Court's decision in the former case commented on as incorrect — Disputed questions as to the preferential claim of two or more competitors, *e.g.*, between nephew and uncle; or between father's and daughter's son — Resolved by the degree of benefit conferred by pindas — Nearer cognate kinsmen preferred to remote agnate — Pindas divided into three classes: 1, direct; 2, participated; 3, obligatory — The classification made in order of merit — Value of the pindas offered by rival claimants, whether agnate or cognate kinsmen, determines their right of succession — Recapitulation — Sapinda heirs arranged into seven groups.

LECTURE XIV.

The Dayabhaga sets out with the proposition that "the right of succession to property is founded on competence for offering oblations at obsequies; and the order of succession is regulated by the degree in which benefits are conferred."

Dayabhaga.

Jimutavahana maintains that the whole theory of inheritance is founded upon the principle of spiritual benefit, and that it is by that principle—and that principle alone—that every question relat-

Its principle of inheritance: spiritual benefit.

LECTURE XIV. ing to inheritance must be determined.[1] According to him, the right of performing the *s'ráddha* and that of succeeding are convertible terms. Even in the extreme case of an escheat to the Crown, the king inherits on the condition that he provides for the funeral rites of the person to whom he succeeds, and the king is debarred from succession to a *Brahmin's* property, because a man of the second or inferior caste cannot minister to the soul of a Brahmin.[2] The competence to perform the s'ráddha *creates* the heritable right, and determines also the *preferable* right to succession. You remember the well-known maxim of the law of inheritance which is in the mouth of every lawyer of the Gouriya School, "Give the *pinda* and take the inheritance." He who is entitled to perform the exequial rites of the deceased, is also entitled to inherit his property. "Two motives are indeed," says the Dayabhaga, "declared for the acquisition of wealth : one, temporal enjoyment ; the other, the spiritual benefit of alms, and so forth. Now, since the acquirer is dead, and cannot have temporal enjoyment, it is right that the wealth should be applied to his spiritual benefit. Accordingly, Vrihaspati says, 'Of property which descends by inheritance, half should carefully be set apart for the benefit of the deceased owner to defray the charges of his monthly,

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[1] 13 Weekly Reporter, 57. [2] Goldstücker's Lit. Rem., Vol. II, 174.

LECTURE XIV.

six-monthly, and annual obsequies.' "[1] In determining the preferential heir, again, "such order of succession must be followed as will render the wealth of the deceased most serviceable to him.[2] It is reasonable that the wealth which a man has acquired should be made beneficial to him by appropriating it according to the *degree* in which services are rendered."[3]

Manu's dictum as to "nearness of kin" interpreted by the author of Dayabhaga.

Manu declares: "To the nearest sapinda the inheritance next belongs." Thus nearness of kin, according to him, determines the order of succession. It must not be pretended, says Jimutavahana, "that the text of Manu is intended to indicate nearness of kin according to the order of birth, and not according to the presentation of offerings." It cannot be denied for a moment that *nearness of kin* does *not* determine the order of succession. It would be rank heresy to deny the truth of the maxim laid down by the father of Hindu Jurisprudence. But the question is, what is the right interpretation of this important expression "nearness of kin." It cannot be said that this *nearness of kin* is "according to birth, for the order of birth is not suggested by the text." This *nearness of kin* cannot be taken to mean consanguineous propinquity, for had Manu intended that proximity of blood-relationship should regulate the right to succession, he would never have coupled this text with the one

[1] Dayabhaga, XI, 6, 13. [2] *Ibid*, XI, 6, 28. [3] *Ibid*, XI, 6, 31.

immediately preceding it, "to three must libations of water be made, to three must oblations of food be presented; the fourth in descent is the giver of those offerings, but the fifth has no concern with them." Manu, therefore, plainly intends that this *nearness of kin* "depends on superiority of benefits by presentation of oblations."[1]

Criterion of the superiority of benefits derivable from oblations.

The conclusion is irresistible that inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit.

Three modes of conferring benefits on the deceased.

Benefits can be conferred upon the deceased by (1) presenting oblations to him at his obsequies, by which he is *directly* benefited; (2) by offering oblations to his paternal ancestors, to whom he presented *pindas* during his lifetime, and in which he claims after death a right of participation; and *lastly* (3), by giving oblations to his maternal ancestors, to whom he was bound, *as a matter of duty*, to give *pindas* at their obsequies.

Competency to perform exequial rites key to the rule of inheritance.

The simple fact of being entitled to give *pindas*—the mere circumstance of being competent to perform the exequial rights, constitutes a claim on inheritance. The title to succession is founded upon the right to perform the s'ráddha of any description whatever,—either of the deceased, of his paternal, or of his maternal, ancestors. It does not matter whether the *s'ráddha* performed is *ekoddishta*, addressed to his individual self, or *parvana*, addressed

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[1] XI, 6. 12, 17, 18, 31.

Lecture XIV.

to himself as well as to his ancestors. In a question of succession to the property of the deceased, the only point to be determined is, whether the person claiming the property is *entitled* to celebrate the exequial rites either of the deceased himself personally, or of his ancestors, for whom he was bound to provide, during his lifetime, oblations of food as well as libations of water. It should be remembered that *s'ráddhas* are either *individual* (*ekoddishta*), or ancestral (*parvana*). Any person who is competent to celebrate in honor of the deceased an *individual s'ráddha*, or a *parvana s'ráddha* in honor of his ancestors, is entitled to inherit the property of the deceased. This is a general proposition, and the whole theory of inheritance propounded by the Dayabhaga is founded upon this proposition.

"It should not be argued," says Jagannatha, "that benefits conferred through the oblation of the funeral cake in the *parvana* constitute the *sole* ground on which rests the right of succession to the property left by a man. There is no authority for such an inference; pupils and the rest, though not conferring such benefits, do succeed to the property left by a man."[1]

Preferential right of the performer of *parvana* rites.

Those persons who are competent to perform the *parvana* rites, however, have a *greater* claim to the inheritance. The performers of the *parvana* rites

[1] 2 Colebrooke's Digest, 544.

have a preferable claim, and they exclude the performers of any other description of exequial rites. All persons who are competent to celebrate *parvana*, or ancestral, rites are also entitled to perform the *ekoddishta*, or *individual*, ceremonies ; but the performers of the latter are *not necessarily* entitled to celebrate the *parvana s'ráddha* in honor of the deceased as well as of his ancestors. Thus you see there is a material difference between the two classes of performers. The performers of the *parvana* rites benefit *not only* the deceased himself, but also his ancestors, while the performers of the *ekoddishta* benefit the individual *only*. There being a difference of spiritual value between the two classes of rites, the heritable value of two classes of rites also varies. Those that offer *pindas* at the *parvana* obsequies, are preferred to those who perform 'individual' s'ráddhas *only*.

In all cases the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right to succession. But the title to perform the *parvana* rites determines the priority of the two classes of heirs. It is for this reason that the *parvana s'ráddha* is said to constitute, as it were, the very corner-stone of the Hindu Law of Inheritance.

Persons competent to perform *parvana s'ráddha.*

It is necessary then to find out the persons who are competent to perform the *parvana s'ráddha*. We are to find out not only the persons who are

competent to perform the *parvana* rites of the deceased proprietor, but also those who are entitled to celebrate these rites in honor of his ancestors, paternal and maternal.

Lecture XIV.

The *parvana s'ráddha*, you should remember, is a s'ráddha with a double set of funeral cakes. One cake is offered to the father, one to the paternal grandfather, and one to the paternal great grandfather. This completes the *first set* of three cakes offered to the paternal ancestors. The *second set* of cakes are given to maternal ancestors, *viz.*, one cake is given to the maternal grandfather, one to the maternal great grandfather, and one to the maternal great great grandfather. The crumbs of the first set are given to the remoter paternal ancestors only.

The mother shares with her husband obsequies solemnly performed by his son ; the paternal grandmother, with her husband ; and the mother of the paternal grandfather, with hers.[1]

This is true of paternal female ancestors only. The maternal grandmother *does not* share with her husband the funeral repast provided for him, nor do the maternal great grandmother and the maternal great great grandmother share it with their respective husbands.[2] I mean to say, that oblations are *separately* given at the parvana (*vriddhi*) obsequies to the

[1] 2 Colebrooke's Digest, 561 ; Dayabhaga, XI, 6, 3.

[2] 2 Colebrooke's Digest, 566.

LECTURE XIV.

female paternal ancestors only; and they are thus associated with their respective husbands in the presentation of these offerings. "*They are one even in death*," says the canonical law.[1]

Relative value of their offerings.

The deceased receives then one *parvana pinda* from his son, one from his grandson, and one from his great grandson. He also receives one pinda from his daughter's son, one from his son's daughter's son, and one from his grandson's daughter's son. The oblations received from the son and the other male descendants, and the oblations received from the daughter's sons and from the other descendants of females, have a difference in spiritual value. The *pindas* received from agnate descendants have greater efficacy than the *pindas* received from cognate descendants. The cakes offered by cognate descendants are secondary pindas. If you remember the *modus operandi* of the parvana s'ráddha, you will at once perceive the difference in spiritual value of these two classes of pindas. The paternal ancestors are honored, *first*, by the presentation of cakes; and the maternal ancestors receive the pindas due to them, after *all* the ceremonies in honor of the paternal ancestors have been completed. "The oblations presented to the maternal grandfather and the rest are secondary," says Jagannatha, "because they must follow funeral cakes offered to paternal ancestors."[2] Thus the *pindas*

Presentations by the agnate superior to those by the cognate descendants.

[1] Mitakshara, I, 253.

[2] 2 Colebrooke's Digest, 567.

given to the maternal ancestors occupy a *secondary* position. The ceremonial writers have even gone so far as to lay down that the parvana s'ráddha may be performed even without noticing the maternal grandfather's line ; the s'ráddha for the maternal ancestors is not requisite to the completion of the parvana obsequies. "In the double set of oblations," says Jagannatha again, "it is indispensably necessary that the son should perform the s'ráddha for the paternal line, not for the line of his maternal grandfather ; but it is simply reprehensible in one who performs the s'ráddha for the paternal ancestors not to perform it also for the maternal grandfather and his progenitors."[1] This simply means that sons are *legally* bound to perform parvana rites in honor of their paternal ancestors. In the case of maternal ancestors, the daughter's son should also celebrate these rites as an act of moral obligation, although not legally bound to do so. Thus there is a great difference in spiritual value between an act of *legal* obligation and an act of *moral* obligation. The *pindas* to the paternal ancestors are the *principal* oblations in a parvana s'ráddha, and those given to maternal ancestors are thus only secondary *pindas*. It is natural then to expect that the deceased derives greater benefit from the *principal* pindas presented to him by his agnate descendants, than from the pindas presented

[1] 2 Colebrooke's Digest, 394.

LECTURE XIV.

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Relative value of their offerings.

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Presentations by the agnate superior to those by the cognate descendants.

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[1] Mitakshara, I, 253. [2] 2 Colebrooke's Digest, 567.

given to the maternal ancestors occupy a *secondary* position. The ceremonial writers have even gone so far as to lay down that the parvana s′ráddha may be performed even without noticing the maternal grandfather's line; the s′ráddha for the maternal ancestors is not requisite to the completion of the parvana obsequies. "In the double set of oblations," says Jagannatha again, "it is indispensably necessary that the son should perform the s′ráddha for the paternal line, not for the line of his maternal grandfather; but it is simply reprehensible in one who performs the s′ráddha for the paternal ancestors not to perform it also for the maternal grandfather and his progenitors."[1] This simply means that sons are *legally* bound to perform parvana rites in honor of their paternal ancestors. In the case of maternal ancestors, the daughter's son should also celebrate these rites as an act of moral obligation, although not legally bound to do so. Thus there is a great difference in spiritual value between an act of *legal* obligation and an act of *moral* obligation. The *pindas* to the paternal ancestors are the *principal* oblations in a parvana s′ráddha, and those given to maternal ancestors are thus only secondary *pindas*. It is natural then to expect that the deceased derives greater benefit from the *principal* pindas presented to him by his agnate descendants, than from the pindas presented

[1] 2 Colebrooke's Digest, 394.

LECTURE XIV.

Thus the title of the deceased to perform the s'ráddha of his grandfather was derived *through* his father; and that of his great grandfather, *through* his grandfather. The father, in the *first* place, was the principal person to whom the deceased was bound to offer the exequial cakes. During his lifetime, it was the *first* duty of the deceased to minister to the spiritual welfare of his father. Those who perform the *same* duty which it was incumbent on the deceased to perform, necessarily occupy the *first* place in a classification of heritable kinsmen. The mere fact of the deceased participating in the pindas offered to the father gives a heritable right to the agnate and cognate descendants of his father. These descendants of the father, however, have another claim, which is not possessed by the descendants of the grandfather or those of the great grandfather. The agnate and cognate descendants of the father perform exequial offices for the father of the deceased, which it was the *first* duty of the deceased owner to perform during his lifetime.

Preferable right of father's descendants over grandfather's.

" Since the paternal uncle, like the nephew of the whole blood, offers two oblations, which the owner was bound to present to two ancestors with their wives, should not the succession," asks Jimutavahana, " devolve equally on the uncle and nephew of the late proprietor?" " The answer is," he adds, " the paternal uncle is indeed a giver of oblations to the grandfather and great grandfather of the

Nephew's claim prior to uncle's.

proprietor ; but the nephew is giver of two oblations to two ancestors, including the owner's father, *who is principally considered.* He is, therefore, a preferable claimant, and inherits before the uncle.

Brother's grandson excludes paternal uncle.

"Accordingly (since superior benefits are conferred by such a successor), the brother's grandson excludes the paternal uncle ; for he is a giver of oblations to the deceased owner's father, *who is the person principally considered.*"[1]

Recapitulation.

Here then the author of the Dayabhaga tells us in effect, that all the heirs of the father's line, *in whose ancestral oblations the deceased has a right of participation*, would exclude the heirs of the grandfather's line, because the former confer superior benefits on the late owner through his father. The agnate descendants of the father present superior oblations to him, and the cognate descendants offer secondary oblations to him. Both classes of descendants, however, present oblations in which the deceased participates. Both classes of these kinsmen, therefore, inherit his property. The agnate kinsmen have a *preferable* right, because they give superior oblations to his father. The cognate kinsmen, giving secondary oblations, come in next after them. A single heir of the grandfather's line would not inherit, till all the heirs, agnate and cognate, of the father's line, giving undivided oblations, have been wholly exhausted.

[1] Dayabhaga, XI, 6. 5-6.

LECTURE XIV.

Rule of proximity of kinship to the proprietor.

"The order of succession by nearness of kin," says Jagannatha, "is proximate to the proprietor himself. Hence a person who confers benefits on the last possessor himself is first heir; after him, the father of the late proprietor, being most near; if he be dead, the persons who confer benefits on the father in the order *of proximity to him.* On failure of these, the paternal grandfather and the rest comparatively near; on failure of the ancestor, he who confers benefits on him." [1]

Illustrations.

Here it would seem that Jagannatha was of opinion that the agnate and cognate descendants of the deceased exclude his father and all his other descendants; that the father and his descendants, agnate and cognate, exclude the grandfather and the heirs of his line; and the grandfather and his descendants exclude the great grandfather and all the other heirs of his line. "Benefits conferred," according to Jagannatha, "are the grounds of the claim to inheritance; now, the benefits conferred by the nearest of kin are more important than those afforded by one who is more distantly related; remote kindred ought, therefore, to inherit *only on failure of nearer kinsmen.*"

This rule is clear, and admits of no doubt whatever in the case of agnate kinsmen. No one can have the hardihood to deny, in the face of the express texts of the Dayabhaga, that the heirs of

[1] 2 Colebrooke's Digest, 565.

a nearer line would exclude the heirs of a remoter line. But the position laid down that the *cognate* kinsmen of a nearer line would exclude even the *agnate* kinsmen of a remoter line has been doubted. We will return to this subject, and see whether the objections raised are well founded.

Sapinda.

According to the Dayabhaga, then, inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit. Let us see now how the author of the Dayabhaga has worked out the principles enunciated by him. But before we do so, I would draw your attention to the definition of the *sapinda*-relationship given in the Dayabhaga.

Bandhayana's definition: partaker of undivided oblation.

Jimutavahana says: "Baudhayana declares, 'The paternal great grandfather and grandfather, the father, the man himself, his brothers of the whole blood, his son by a woman of the same tribe, his son's son and his grandson: all these, partaking of undivided oblations, are pronounced sapindas. Those who share divided oblations are called sakulyas.'

"The meaning of the passage is this: since the deceased partakes, through *sapindana*,[1] of three

[1] The word *sapindana* has a technical signification. It means admixture of *pindas* at the first annual sraddha, or *sapindikarana*. In the extract given above the meaning is, that the deceased tastes a funeral cake with his father, grandfather, and great grandfather at his own *sapindikarana*, performed by his own son (2 Colebrooke's Digest, 519). The same word *sapindana*, which has been used twice in the extract given above, occurs also in XI, 1. 29. In all these places, it bears the same meaning. The deceased has *then only* a right of participation in the *parvana* pindas given to his three immediate paternal ancestors, when

LECTURE XIV.

oblations presented to the father, &c. ; and since the son and other descendants, to the number of three, present oblations to the deceased (or to be shared by his manes) ; and since he who, while living, presents an oblation to an ancestor, partakes through *sapindana*, when deceased, of oblations presented to the same person : therefore, such being the case, the middlemost (of seven)—who, while living, offered food to the manes of ancestors, and when dead participates in offerings made to them,—has become the object to which the oblations of his descendants were addressed in their lifetime, and shares with them, when they are deceased, the food which must be offered by the daughter's son and others. It follows from all this, that those (ancestors) to whom he presented oblations, and those who present oblations to him, are *sapindas* connected by undivided oblations, partaking as they do of undivided offerings.

So, inasmuch as one distant in the fifth degree neither gives an oblation to the fifth in ascent, nor shares the offering presented to his manes ; and inasmuch as the fifth in descent neither gives oblations to the middle person who is distant from him in the

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his pinda has been mixed (sapindana) with that of *any one* of them on whom he was bound to confer oblations during his lifetime. So long as this rite of fellowship is not performed, the deceased is not associated with the manes of his ancestors, and is not entitled to participate in the pindas given to them. (Bhavadeva, 323; Raghunandana, 133; Nirnaya Sindhu, 520; Dharma Sindhu, 65.)

fifth degree, nor partakes of offerings made to him; therefore, three ancestors, from the grandfather's grandfather upwards, and three descendants, from the grandson's grandson downwards, partaking of divided oblations, and not participating in the same undivided oblations, are denominated *sakulyas*.

"This relation of *sapindas* (extending no further than the fourth degree), as well as that of *sakulyas* has been propounded relatively to inheritance."[1]

Sapinda-relationship extends to seven generations.

If you carefully analyze this extract, you will find that, according to Jimutavahana, the *sapinda*-relationship extends to seven generations, and that it is founded on the right of participation in the *same* exequial offerings. In other words, those are *sapindas* who partake of the *same* undivided oblations in which the deceased also participates. Two conditions are necessary to constitute this relationship: The deceased should partake of the offerings either given *directly* to himself, or to his ancestors. *Secondly*, the kinsmen who claim this relationship should show that they also have a right of participation in the *pindas* given either directly to the deceased or to his ancestors. The deceased and his kinsmen are sapindas of each other, if they mutually *participate* in the *same* offerings at the obsequies.

Two requisites of the relationship.

Illustration of the rule as regards son.

The son is a sapinda of the deceased, because the son partakes, after his death, of the oblations given

[1] Dayabhaga XI, 1, 37-39.

to the deceased and his two immediate ancestors; and the deceased partakes of three offerings given by his son during his lifetime to himself and his two ancestors.

Grandson.

The grandson is a *sapinda*, because he, when dead, partakes of two oblations given to his grandfather and great grandfather; and the late *proprietor* partakes of two oblations given to himself and his father.

Great grandson.

The great grandson is a *sapinda*, because he partakes, when dead, of offerings which may be given to the late proprietor by his daughter's son, son's daughter's son, and grandson's daughter's son; and the late proprietor partakes of the oblation given to him by his great grandson during his lifetime.

Thus we see the three agnate descendants and the deceased are sapindas of each other, because they *mutually* partake of offerings given at the *parvana* obsequies.

Daughter's, son's daughter's, and the grandson's daughter's son do not come under the above definition.

The daughter's, the son's daughter's, and the grandson's daughter's son—all these cognate descendants of the deceased do not come under *this* definition of *sapinda;* because, although the deceased owner partakes of *pindas* given by them during their lifetime, they have *no right of participation* in the oblations given to their maternal ancestors, *viz.*, the deceased owner and his father and grandfather. One of the two conditions necessary to constitute the *sapinda*-relationship is wanting in the case of these *cognate* descendants. The deceased

and his cognate descendants have no *mutual* right of participation in the exequial offerings. The daughter's, son's daughter's, and the grandson's daughter's son, therefore, are not *sagotra*, or agnate sapindas, of the deceased.

Father.

The father, again, is a sapinda of the deceased, because the father has the right of participation in three pindas offered by the late owner, before his death, to the three immediate ancestors ; and the deceased owner partakes of the *pindas* which may be offered to his father by his descendants and collateral kinsmen. So in the case of the grandfather and the great grandfather.

Brother.

The brother is a sapinda, because the brother, when dead, partakes of offerings given to the common father by the late proprietor and his descendants; and the late proprietor has a right of participation in offerings given by his brother to the father and the other common ancestors.

Uncle.

The uncle is a *sapinda*, because the uncle partakes, when dead, of the offerings given by the deceased and his son to common ancestors, *viz.*, the uncle's father and grandfather ; and the deceased had a right of participation in the offerings presented by the uncle and his descendants to common ancestors.

Grand-uncle's grandson.

The grand-uncle's grandson is a sapinda, because he and the deceased have a right of participation in the offerings presented to the common ancestor, the great grandfather of the deceased.

Lecture XIV.

Summary.

Thus you see, the father, the grandfather, and the great grandfather are sapindas of the deceased. The brother and his two agnate descendants, the uncle and his two descendants, and the grand-uncle and his two descendants,—all these kinsmen in the three collateral branches are also *sapindas* of the deceased.

The father's, brother's, uncle's, grand-uncle's daughter's sons, and the other cognate descendants of the paternal ancestors and collateral kinsmen are *not sagotra sapindas* of the deceased, because, *although* the deceased partakes of the undivided oblations given to his paternal and their maternal ancestors, *they* have no right of participation in the oblations given to *their* maternal ancestors. Inasmuch as, therefore, the deceased and his cognate kinsmen do *not mutually* partake of undivided oblations, they are not *sagotra sapindas* of the deceased.

You see also that the sapinda-relationship includes seven degrees, *viz.*, the three degrees in ascent and three in descent, and the deceased himself is counted as the seventh degree. In the collateral branches, however, the sapinda-relationship reaches only to the fourth degree.

Baudhayana's definition, though elaborate, is incomplete.

Jimutavahana has, you see, given us full explanations regarding the true meaning of the word *sapinda.* But you will observe that this definition, elaborate as it is, fails to comprehend within it the cognate sapindas, or kinsmen related through females.

It does not include

LECTURE XIV.

kinsmen related through females.

The daughter's son is a sapinda ; father's, brother's, uncle's, and grand-uncle's daughter's son is also a sapinda. The maternal grandfather, the maternal uncle, and other maternal kinsmen belonging to the family from which the deceased's mother has sprung, are sapindas. It is an undoubted fact that they are *sapindas*, but the definition given above—framed by Baudhayana and adopted by Jimutavahana—cannot be applied to them. One of the two conditions essentially necessary to constitute the *sapinda*-relationship is wanting in them. The cognate kinsmen *ex parte paterna* do *not* participate in oblations offered by them to their maternal ancestors ; and the deceased does not participate in oblations which are given to his maternal ancestors. The definition given by Baudhayana then is *incomplete.* It merely determines agnate *sapindaship ;* cognate *sapindaship* is left untouched.

Jimutavahana's definition.

Jimutavahana keenly felt that the definition of Baudhayana was incomplete ; and he has, accordingly, very sparingly used the word *sapinda* in determining the heritable right of the kinsmen of the deceased. Other lawyers, however, have largely used the word 'sapinda' in their discussions regarding the same heritable right. It was necessary, therefore, to indicate in some way or other what the author of the Dayabhaga thought was the true signification of the term *sapinda.* Baudhayana's definiton being *incomplete*, he has himself given us

LECTURE XIV.

a definition which satisfies all the requirements of the principle upon which the theory of inheritance has been based.

The following is a literal translation of the definition referred to above: [1]

Persons allied by a common oblation, without reference to the stocks to which they belong.

"He who is born of the same (*kula*) stock [though he be not of the same *gotra*, as for instance, his own daughter's son, his father's daughter's son, &c.], or born of a different (*kula*) stock [as the maternal uncle or the like], is a *sapinda* [by reason of the connection arising from the presentation of common oblations to three ancestors in the family (*kula*) of the father, or in that of the mother of the deceased owner]. The text, 'To three must libations of water be made, &c.,' is intended to propound the succession of such kinsmen; and the subsequent passage, 'To the nearest sapinda, &c.,' must be meant to discriminate them according to their degree of proximity."

Connection by funeral offerings the only requisite.

According to this definition, the only condition necessary to constitute the *sapinda*-relationship is the connection by funeral offerings. Those are sapindas who can show that there is a *pinda* connection between them. The agnate and cognate descendants are sapindas, because they present oblations *to* the deceased. The paternal and maternal ancestors are sapindas, because they received oblations *from* him. The collateral kinsmen, paternal

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[1] Dayabhaga, XI, 6, 19.

and maternal, are sapindas, because they present oblations to ancestors, to whom the deceased also was bound to present them during his lifetime.

Lecture XIV.

Cognate and agnate sapinda-ships; their distinctive marks.

It should be remarked that this definition is specially intended to mark accurately the distinctive signs of cognate sapindaship. Sagotra sapindaship, or the relation subsisting between agnate kinsmen, has been defined already. Agnate sapindaship must be founded upon the right of *mutual* participation in oblations. But cognate sapindaship, or the relation of a sapinda subsisting between kinsmen connected through females, is constituted by the right of presenting funeral offerings, and irrespective of participation in them. The question of participation is taken into consideration only in separating the agnate descendants of the maternal ancestors from their cognate descendants.

His own, his son's, and his grandson's daughter's sons are sapindas of the deceased, because they present oblations to him. The father's, brother's, and nephew's daughter's sons are sapindas, because they present oblations to the father. Similarly, the grandfather's and great grandfather's, as well as their son's and grandson's, daughter's sons are sapindas, because these present oblations to the grandfather and great grandfather respectively.

In the maternal line again, the maternal grandfather, great grandfather, and the great great grandfather are *sapindas*, because they receive oblations from the deceased. The three agnate

LECTURE XIV.

and cognate descendants of each are also sapindas, because they present oblations to the three maternal ancestors of the deceased.

Genealogical scheme of sapindas.

The annexed genealogical trees will make this intelligible:—

In the father's line.

I. Sapindas in the father's line:

Here *a*, *b*, and *c* represent the son, the grandson, and the great grandson of the deceased. These are his lineal *agnate* sapindas.

The line on the left hand side of the propositus, and on the left of *a*, and of *b*, are the lines of their daughters. *d* represents the daughter, *S* the daughter's son. s_1, s_2, s_3, his own, his son's, and his grandson's daughter's sons, are the lineal *cognate* descendants of the deceased.

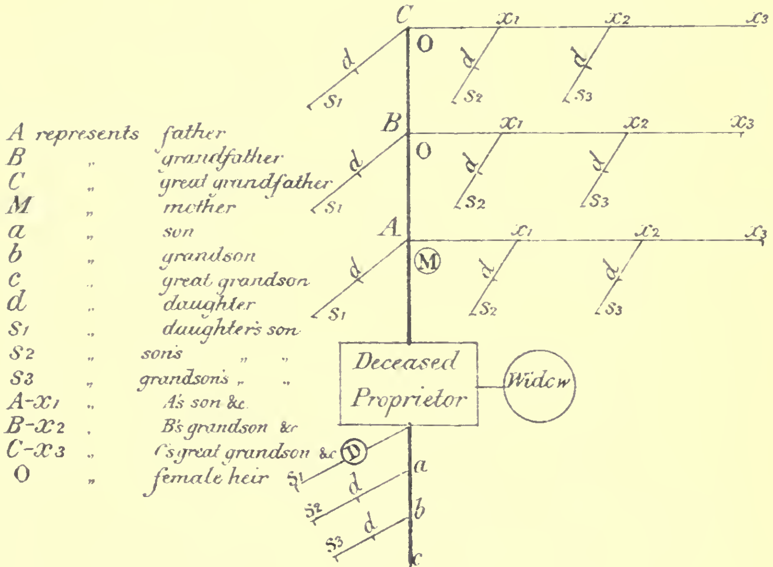
A, *B*, *C* are the father, grandfather, and the great grandfather of the deceased. They are his lineal agnate ancestors.

A—x_1, x_2, x_3; *B*—x_1, x_2, x_3; *C*—x_1, x_2, x_3 are the son, grandson, and great grandson of *A*, *B*, and *C* respectively. These are the collateral *agnate* sapindas of the deceased.

A—s_1, s_2, s_3 denote *A's* daughter's son, *A's* son's daughter's son, and *A's* grandson's daughter's son respectively; *B*—s_1, s_2, s_3 denote *B's* daughter's son, *B's* son's daughter's son, and *B's* grandson's daughter's son respectively; *C*—s_1, s_2, s_3 denote *C's* daughter's son, *C's* son's daughter's son, and *C's* grandson's daughter's son respectively. These are collateral *cognate* sapindas of the deceased.

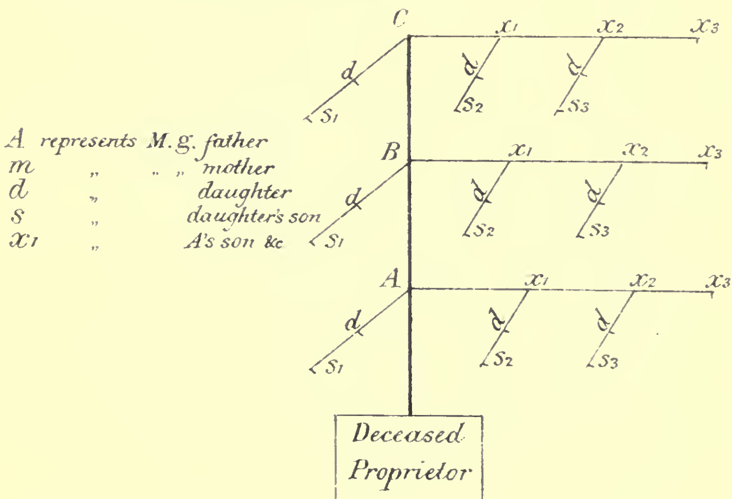
I

Dayabhaga—Ex parte paterna Sapindas.



II

Dayabhaga—Ex parte materna Sapindas.



II. Sapindas in the mother's line:

In the mother's line.

In the second genealogical tree, A, B, and C are the *maternal* grandfather, great grandfather, and the great great grandfather of the deceased. They are his lineal cognate ancestors in the mother's line.

A—x_1, x_2, x_3; B—x_1, x_2, x_3; C—x_1, x_2, x_3 are the son, the grandson, and the great grandson of A, B, and C respectively. These are also cognate sapindas of the deceased.

A—s_1, s_2, s_3; B—s_1, s_2, s_3; C—s_1, s_2, s_3 denote the daughter's son, son's daughter's son, and grandson's daughter's son, of A, B, and C respectively. These also are cognate sapindas of the deceased.

'Agnates' higher than 'cognates.'

Here it should be remarked, that, as in the father's family the agnate *sapindas* of the paternal ancestors occupy a higher rank as heirs than their cognate sapindas *in each line*, so in the mother's family also the agnate sapindas of the maternal ancestors are preferred as heirs to the cognate sapindas *in each line*.

Summary.

You will thus see that sapindas are of two descriptions—*sagotra*, or agnate sapindas; and *bhinnagotra*, or cognate sapindas. In both cases the sapinda-relationship is founded upon the connection arising from exequial offerings. Two persons are agnate *sapindas* of each other if they both participate in oblations offered either to the deceased himself or his paternal ancestors. A is cognate sapinda of B, if it can be shown that B is related to

LECTURE XIV.

A through a female, and that oblations are offered by him to *A* or to common ancestors.

Calcutta High Court's definition of *sapinda*-relation.

In speaking of the sapinda-relationship, the Calcutta High Court declared:—"If two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled, after his death, to participate in the oblations offered by the survivor to that ancestor or ancestors; and hence it is that the person who offers those oblations, the person to whom they are offered, and the person who participates in them, are recognized as sapindas of each other."[1]

Limited to the *sagotras*.

The definition given above applies to *sagotra* sapindaship, and does not include *all* the *bhinnagotra*, or cognate, sapindas. I have pointed out to you already that a cognate sapinda *ex parte paterna* is *not* entitled after his death to *participate* in the oblations offered by him to the paternal ancestors of the deceased. He cannot, therefore, come under the definition given by the High Court. According to this definition, the deceased and his maternal uncle *cannot be* sapindas of each other; because the deceased has *no* right of participation in the oblations presented by the maternal uncle to common ancestors. If we are to accept this definition, a maternal kinsman must be excluded from the sapinda relationship.

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[1] 5 Bengal Law Reports, 40.

The following definition will include both the *sagotra* and the *bhinnagotra* sapindas of the deceased:—

Lecture XIV.

Definition including the *sagotras* and *bhinnagotras.*

The persons who directly offer funeral oblations to the late owner, the persons who received them from him, and the persons who present these cakes to common ancestors to whom the deceased also was bound to present them are recognized as sapindas of the late proprietor. If *A* gives an oblation to *B*, *A* is a sapinda of *B*. If *A* receives an oblation *from* *B*, *A* is a sapinda of *B*. If *A* and *B* present oblations to a common ancestor *C*, *A* and *B* are recognized as sapindas of each other.

This definition of sapinda, it will be observed, is good for all purposes of inheritance. It includes agnate as well as cognate sapindas of the deceased.

Dayabhaga's list of heirs not exhaustive

It will be observed that the son's and grandson's daughter's son, the brother's and uncle's daughter's son, and the other cognate sapindas of the deceased on the father's side are nowhere mentioned as heirs in the Dayabhaga. It has been contended, that as these cognate sapindas have not been specifically mentioned as heirs by the Dayabhaga, it could not have been intended by Jimutavahana that these cognate kinsmen should be entitled to inherit. This cannot be considered as a valid objection. "Every one who has gone through the Dayabhaga," says the Calcutta High Court, "must have perceived that the specific enumeration of each individual heir was not the object which the

Lecture XIV.

author (of the Dayabhaga) had in view. It is perfectly true that a few of the heirs have been mentioned by name here and there; but the great majority of them have been left to be determined by the application of the principle of spiritual benefit. Thus, of the numerous relatives who are entitled to come in as sapindas by virtue of their right to offer oblations to the maternal ancestor of the deceased proprietor, the maternal uncle is the only one who has been mentioned by name. Then again, among the sakulyas, or kinsmen connected by divided oblations, the grandson's grandson is the only person who has been specifically enumerated; and of the samanodakas, or kinsmen connected by libations of water, not one even has been so enumerated. In the face of all these facts, it is impossible to contend that the mere absence of specific enumeration is any ground whatever for excluding *one* single individual who is really competent to fulfil the condition of heirship laid down in the Dayabhaga itself."[1]

Specific mention of daughter's son, father's, grand-father's, and great grand-father's daughter's son as cognate kinsmen.

Of all the numerous cognate kinsmen, sprung from the general family of the deceased, who are entitled to inherit, the daughter's son, the father's, the grandfather's, and the great grandfather's daughter's son are the only persons who have been specifically enumerated as heirs in the Dayabhaga.

[1] 5 Bengal Law Reports, 42.

Srikrishna Tarkalankara, the author of the Dayakrama Sangraha, says:—

LECTURE XIV.

Three more heirs named in the Dayakrama Sangraha.

Brother's daughter's son.

"In default of the father's daughter's son, the brother's daughter's son succeeds, for he presents two funeral cakes in which the deceased owner participates, namely, to his (owner's) father and paternal grandfather.[1]

Uncle's daughter's son.

"In default of the paternal grandfather's daughter's son, the uncle's daughter's son succeeds, because he presents two oblations in which the deceased owner participates, namely, to the owner's paternal grandfather and great grandfather.[2]

Grandfather's brother's daughter's son.

"(In default of paternal great grandfather's daughter's son), the succession next devolves on the paternal grandfather's brother's daughter's son, who presents an oblation in which the deceased owner participates, namely, to the owner's paternal great grandfather." [3]

Thus Srikrishna Tarkalankara has made three additions to the list of cognate sapindas given in the Dayabhaga. Srikrishna could not muster courage to include the other cognate sapindas in the line of heirs. The generation which followed Srikrishna, however, recognized the rest of the cognate sapindas as entitled to inherit.

Jagannatha's extension of the list of heirs.

Jagannatha, whose reputation as an expounder of Hindu law is very great in the Bengal School, thus declares the right of succession of the son's and

[1] Dayakrama, I, 10. 2. [2] *Ibid*, I, 10. 10. [3] *Ibid*, I, 10-27.

LECTURE XIV.

grandson's daughter's son, as well as that of the other cognate sapindas:—

"It should be remarked," says Jagannatha, "that the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, *and so forth*, claim succession, in the order of proximity, before the maternal grandfather; for they also confer benefits by the oblation of funeral cakes."[1]

By the expression '*so forth*,' Jagannatha clearly indicates that, in default of nearer heirs, the heritage passes successively to the uncle's and his son's daughter's son, as well as to the grand-uncle's and his son's daughter's son. Jagannatha has, in this way, made *five* fresh additions,—*two* in the descending line, and *three* in the collateral branches.

Enumeration of cognate sapindas.

We see, then, that all the cognate *sapindas*, sprung from the general family of the deceased, have been recognized as heirs by the jurists of the Bengal School. They are as follow:

1. Daughter's son of the deceased.
2. Son's daughter's son.
3. Grandson's " "
4. Father's " "
5. Brother's " "
6. Nephew's " "
7. Grandfather's " "
8. Uncle's " "
9. Uncle's son's " "

[1] 2 Colebrooke's Digest, 567.

10. Great grandfather's daughter's son.
11. Grand-uncle's " "
12. Grand-uncle's son's " "

Now the question is, in what *order* does the right of inheritance accrue to them. Order of their succession

Every one who has carefully read the *Dayabhaga* must have remarked the extreme solicitude of the author to establish the right of inheritance of cognate *sapindas* on precisely the same basis as that of agnate kinsmen. He takes every possible opportunity to impress upon us the fact, that " sons of daughters of the family " are entitled to inherit *immediately after* the agnate sapindas of the same line. The reason of his laying so much stress upon the proposition that cognate sapindas inherit *immediately after* the agnate sapindas of each line was, that, in his opinion, the rights of these two classes of sapindas were co-ordinate. The only difference was, that the rights of the cognate kinsmen were *inferior* to those of agnate kindred of the *same line.* The moment, however, the rights of the cognate kinsmen of a *nearer* line were in competition with those of the agnate sapindas of a remoter line, the former were preferred without the least hesitation to the latter. As propounded in the Dayabhaga.

From Vijnanesvara to Vachaspati Misra, all the great lawyers of India were of opinion that the cognate kinsmen should, as a class, be postponed to the agnate kinsmen. " The *bandhus*, or cognates, By Vijnanesvara and his followers.

LECTURE XIV.

shall inherit *after* the gotrajas, or gentiles, are exhausted." This was the inflexible rule regarding the order of succession which was adopted by all the eminent followers of Vijnanesvara. The family property should be kept within the limits of the family, and no exception whatever was to be made to this rule. If the family was joint and undivided, even the daughter's son of the deceased must give up his rights in favor of the undivided brother of the deceased. We have seen after what a hard struggle a concession was made in favor of the daughter's son, where the property was separated. The daughter's son of the deceased inherited the property of his maternal grandfather, if he died separated from his co-heirs. This favor shown to the daughter's son of the late proprietor was not extended to the other cognate kindred of the deceased. They were classed as *bandhus*, and the right of inheritance accrued to them as such after the gotrajas.

Claims of the daughter's son as heir first recognized by Jimutavahana.

Jimutavahana first of all established the proposition that the daughter's son was equally entitled to inherit, whether or not his maternal grandfather died separated from his co-heirs. He had an indefeasible right in the inheritance left by his mother's father. This doctrine naturally flowed from the principle of ownership propounded by him.

Why do not the cognate sapindas of

If the daughter's son of the deceased was allowed to inherit *immediately after* the agnate descendants

of the same line, why should not the same analogy be followed in the case of the *cognate* sapindas of the father, grandfather, and great grandfather?

Lecture XIV.

father, grandfather, and great grandfather inherit after the agnate descendants.

The elaboration of the whole theory of spiritual benefit, it seems to us, is an irrefutable answer to this pertinent question. The great object of Jimutavahana in applying the theory of spiritual benefit for the purpose of determining disputed questions of inheritance is, we believe, nothing more nor less than an attempt to *connect together* the agnate and cognate sapindas of the same line as heirs. His object was to prove that the cognate, equally with the agnate, sapindas of a nearer line exclude agnate kindred of a remoter line.

Medhatithi, Apararka, and the other eminent jurists before his time had propounded the theory of spiritual benefit, and successfully applied it in settling all questions of disputed succession among the agnate kindred. The claims of the son and the grandson of the deceased and of his ancestors were acknowledged, and even the right of the great grandson was established on a firm basis. But the rights of the *bandhus* as preferential heirs were uniformly repudiated. Apararka even went so far as to deny the preferable right of the daughter's son in a divided family. According to Apararka, the great expounder, after Medhatithi, of the doctrine of spiritual benefits, the daughter's son should inherit along with the *other* bandhus, and

no especial favor should be shown to him. If you once admit, he argues, that *bandhus* as a class should be postponed to the *gotrajas*, you must necessarily exclude the daughter's son in favor of an agnate kinsman of the deceased.

Agnate and cognate sapindas of a nearer line exclude the sapindas of a remoter line.

Jimutavahana felt the hardship of this law, and to remove the injustice done to the "sons of daughters of the family," he elaborated the theory of spiritual benefit, and showed that the doctrine which regulates the order of succession of agnate kinsmen should also apply to the cognate sapindas; and the agnate and cognate sapindas of the nearer line should be preferred to the sapindas of a remoter line.

Illustrations.

It is really very hard, he thought, that the great great grandson of a great great grandson of a paternal ancestor fourteenth in ascent should be preferred as an heir to the son's daughter's son, or the sister's son. A person naturally wishes to bequeath his property to one to whom he is bound by ties of affection and blood. A son's daughter's son, or a sister's daughter's son, therefore, should have a greater claim than the most remote kindred of the agnate line.

The great aim of Jimutavahana is to prove that, by the admitted principles of the Law of Inheritance, the agnate and the cognate kinsmen should come in *together* to claim the inheritance left by the deceased owner.

Extracts from the Dayabhaga

The following extracts, which I shall now give you from the Dayabhaga, will show how great was the

anxiety of Jimutavahana that the cognate *sapindas* should succeed to the property of the deceased immediately after the agnate sapindas of the same line.

Lecture XIV.

The proposition is not disputed that the succession should devolve on the daughter's son in default of agnate descendants:—

In support of the heritable rights of cognate sapindas.

"As the daughter is heiress of her father's wealth, in right of the funeral oblation which is to be presented by the daughter's son, so is the daughter's son owner of his maternal grandfather's estate in right of offering that oblation, notwithstanding the existence of kindred, such as the father and others.[1] The father's right of succession should be after the daughter's son and before the mother; for the father, offering two oblations of food to other manes in which the deceased participates, is inferior to the daughter's son, who presents one oblation to the deceased and two to the other manes in which the deceased participates."[2]

In preference to an agnate sapinda of a remoter line.

The daughter's son is the first cognate sapinda whose heritable right is in competition with that of an agnate sapinda of a remoter line, namely, the father. Even the father must be postponed to make room for a cognate sapinda belonging to the line of the deceased. The preferable right of the daughter's son is "a result of reasoning," for he confers greater benefits on the deceased than the father.

[1] Dayabhaga, XI, 2, 17. [2] XI, 3. 3.

LECTURE XIV.

Sister's son.

The reasons, says Jimutavahana, which regulate the succession of the daughter's son, are precisely the same which determine the preferable right of the sister's son:

"On failure of heirs of the father down to the great grandson, it *must be understood* that the succession devolves on the father's daughter's son, *in like manner* as it descends to the owner's daughter's son.

Grand-father's and great grand-father's daughter's son.

"The succession of the grandfather's and great grandfather's lineal descendants, including the daughter's son, *must be understood in a similar manner*, according to the proximity of the funeral offering. Since the reason stated in the text—'for even the son of a daughter delivers him in the next world, like the son of a son'[1]—is equally applicable; and his father's or grandfather's (and great grandfather's) daughter's son transports his manes over the abyss, by offering oblations of which he may partake.

"Accordingly, Manu has not separately propounded their right of inheritance; for they are comprehended under the two passages, 'To three must libations of water be made, &c.,'[2] and 'To the nearest *sapinda* the inheritance next belongs.'[3] Yajnavalkya likewise uses the term 'gentiles,' or *gotraja* kinsmen, for the purpose of indicating the right of inheritance of the daughter's son of father *and others*, as sprung from the same line, in *the relative order* of the funeral oblation."[4]

[1] Manu, IX, 139. [2] IX, 186. [3] IX, 187. [4] XI, 6, 8-10.

Lecture XIV.

They inherit in the relative order of the funeral oblations.

Here you may notice the anxiety of the author of the Dayabhaga *to associate together* the heritable right of the sons of the daughters of the family with that of the agnate descendants. Yajnavalkya, he says, has included the *sons of daughters* of the family under the term 'gentiles,' or *gotrajas*. As the agnate descendants and ascendants are gotrajas, so are the sons of daughters of the family, "as sprung from the same line." The right of inheritance of the daughter's son of the father, and of the daughter's son "*of others*, is in the relative order of the funeral oblation." According to Yajnavalkya, then, says Jimutavahana, there is no difference between the agnates and the cognates of the same family as regards their heritable right. There is some difference, however, as regards their preferable right. They inherit *in the relative order of the funeral oblations.* The father's, the grandfather's, and the great grandfather's daughter's son, as well as the sons of daughters of others of the family, who are competent to benefit the deceased, exclude the agnates of a remoter line, in accordance with "the relative order of the funeral oblation," simply because they offer participable oblations to nearer ancestors of the deceased. They are gotrajas, and as such are entitled to inherit *along with* the other gotrajas of the male line.

According to Manu the agnate and cog-

Manu too, adds Jimutavahana, has made no distinction between the son's son and the daughter's

LECTURE XIV.

nate descendants are on the same footing.

son. Both of them equally deliver the deceased in the next world by the presentation of funeral oblations. The reason—deliverance in the next world —by which his own daughter's son gets the inheritance, applies equally to the daughter's son of the father and that of others. Manu has not thought it necessary to propound *separately* the right of inheritance of the sons of daughters of the family. The same texts which declare and determine the heritable and the preferable rights of agnate sapindas, declare and determine also the heritable and the preferable rights of the cognate sapindas. The agnate descendants and the cognate descendants are on the same footing, *because* both classes of kinsmen deliver the manes in the next world. Therefore, both classes have equal heritable right. Some difference, however, is to be observed in fixing their order of succession. The succession devolves on the father's daughter's son in preference to the agnate sapindas of the grandfather's line, simply because the former offers funeral oblations to *a nearer ancestor* of the deceased. The right of inheritance accrues to the owner's daughter's son in preference to the agnate sapindas of the father's line, simply because the former offers oblations directly to the deceased. The succession of the other sons of daughters of the family "must be understood in a similar manner according to the proximity of the funeral offering." The proximity

The order of their succession being determined by the following rule,—offerer of oblation to a near ancestor is preferred to one presenting the same to a remote ancestor.

of the funeral offering, then, with reference to the deceased, regulates the order of succession. This can have no other meaning than this. In a competition between cognate and agnate sapindas of two lines, those who offer oblations to a nearer ancestor are *preferred* to those who offer them to a remoter ancestor. In all cases *the proximity of the funeral oblations* will determine the priority of claimants to succession.

In order that the daughter's son may not be forgotten in the distribution of the property among the agnate sapindas of the deceased, the author of the Dayabhaga reminds us, whenever an opportunity occurs, that the sons of daughters have *equal* rights with those of agnate kinsmen: "On failure of any lineal descendant of the paternal grandfather *down to the daughter's son*, who might present oblations in which the deceased would participate, the property devolves on the maternal uncle, &c."[1] Here he pointedly refers to the daughter's son, who succeeds immediately after the agnate sapindas of the same line. Again, "the text of Manu, 'To three must libations of water be made, &c.,' is intended to propound the succession of cognate kindred; and the subsequent passage, 'To the nearest sapinda, &c.,' must be explained as meant to discriminate them according to their order of proximity."[2] Again, "If the right of the father's

[1] Dayabhaga, XI, 6, 12. [2] XI, 6, 19.

LECTURE XIV.

daughter's son, and of the maternal uncle, and similar cognate kinsmen, be not considered as intended by the text, 'To three must libations of water be made, &c.,' they would have no right of succession, since they have not a place among distant kinsmen and others whose order of succession is specified." It is no use, he says, in expatiating on this subject any further. Inheritance is in right of benefits conferred, "and such order of succession *must be* followed as will render the wealth of the deceased most serviceable to him."[1] That order of succession alone must be followed which is determined by "the proximity of funeral oblations." That order of succession alone is sanctioned by Manu and Yajnavalkya, and is founded on reason, which accords with "the relative order of funeral oblations." "It is reasonable that the wealth which a man has acquired should be made beneficial to him by appropriating it *according to the degree* in which services are rendered to him."[2] The cognate sapindas of a nearer line confer greater benefits on the deceased than the agnate sapindas of a remoter line; they should, therefore, be preferred to the latter.

Daughter's son: sense of the term as used in the Dayabhaga.

'*Dauhitra*,' or daughter's son, is a generic term. It denotes the sons of daughters as a class. It includes *all* the sons of daughters of the family. Ordinarily, *dauhitra santana* in Bengal signifies the

[1] Dayabhaga, XI, 6, 28. [2] XI, 6, 31.

descendants of daughters sprung from the general family. If the term 'daughter's son' be joined with any particular individual, it means, of course, the son of the daughter of that particular person. But if the term be used *generally*, without associating it with any person whatsoever, it would be taken to mean the sons of daughters in general. *In common parlance* it is often taken in this general sense, and it can safely be asserted that the author of the Dayabhaga also employed the term 'daughter's son' in the same sense in which it is used now. If the term 'daughter's son' be taken to signify the sons of daughters of the family who are competent to offer exequial cakes, the language of the Dayabhaga becomes intelligible and consistent. Let me once more draw your attention to the following passages from the Dayabhaga:

"The succession of the grandfather's and great grandfather's lineal descendants, *including the daughter's son*, must be understood in a similar manner, according to the proximity of the funeral offering.[1]

"On failure of any lineal descendants of the paternal great grandfather down to the *daughter's son*, who might present oblations in which the deceased would participate, the property devolves on the maternal kindred.[2]

"On failure of the father's daughter's son, or

[1] Dayabhaga, XI, 6, 9. [2] XI, 6, 12.

LECTURE XIV.

other person who is a giver of three oblations which the deceased shares, or which he was bound to offer, the succession devolves on the maternal kindred.[1]

"Yajnavalkya likewise uses the term '*gotraja*,' or gentiles, for the purpose of indicating the right of inheritance of *the daughter's son* of the father and of others, as sprung from the same line, in the relative order of the funeral oblation." [2]

It is useless to multiply instances. If in all the passages quoted above the term 'daughter's son' be taken to mean the sons of daughters of the line with which the term is joined, the language of the Dayabhaga becomes consistent, and the theory of inheritance propounded in the Dayabhaga yields uniform results.

"Sons of the daughters of the family."

It will be noticed that Jimutavahana is careful in using the word *santati* in specifying the heritable descendants of the grandfather and the great grandfather.[3] I have pointed out to you that the term *santati*, or 'descendants,' joined with the word 'daughter's son,' means, *in common parlance*, the sons of daughters of the family. The Dayabhaga, therefore, instead of rejecting the claims of the sons of daughters, recognizes them in direct terms, and places the cognate kinsmen as heirs immediately after the agnate kindred of the same line.

That the author of the Dayabhaga only looks to the competence of a person to offer funeral oblations

[1] Dayabhaga, XI, 6, 20. [2] XI, 6, 10. [3] XI, 6, 9.

in determining his heritable and preferable rights, is quite clear from the numerous quotations we have given; and from none more so than from the text of Manu extracted by Jimutavahana for the purpose of showing that the heritable and preferable rights of the "daughter's son of the father and of others" are analogous in every respect to those of his own daughter's son.[1]

Lecture XIV.

Omission of certain cognate kinsmen as heirs in the Dayabhaga, how accounted for.

The Dayabhaga specially mentions the daughter's son of the deceased, and his father's, grandfather's, and great grandfather's daughter's son as entitled to inherit his property. But he nowhere specifically mentions the other cognate kinsmen as heirs. It has been contended on the strength of this omission that "the order of succession specified in the Dayabhaga down to the *sakulyas* is so complete by itself that there is no room left for the introduction of any other cognate kinsmen, who, if they are entitled to come in at all, *must come in* immediately after the earlier class of sapindas mentioned in the Dayabhaga." This objection cannot be entitled to much weight. For, "if the Dayabhaga," in the language of the Calcutta High Court, "were a work of the same character as the Dayakrama Sangraha of Srikrishna Tarkalankara, which does not pretend to do anything more than lay down a mere table of succession, or a categorical list of heirs, there might have been some foundation for this argument.

[1] Dayabhaga, XI, 6, 9.

LECTURE XIV.

But when we consider that the real object which the author of the Dayabhaga had in view was to establish a general principle of his own, and not to go through all the particular applications of that principle, it is impossible to attach any weight to an argument of this sort."[1]

Their position.

It has been further urged that the precise position which the cognate kinsmen of the family, besides those enumerated by Jimutavahana, would be entitled to hold according to the principle of spiritual benefit, would interfere with the position which the author of the Dayabhaga assigns to some of the earlier class of heirs mentioned by him. The precise position, for example, which the son of a brother's, and paternal uncle's, daughter would be entitled to hold, would militate against the position assigned by him to the grandfather, and the great grandfather, and the other agnate sapindas of the two lines respectively. For, according to the principle of spiritual benefit, the grandfather with his agnate descendants, and the great grandfather with his agnate descendants, ought to be postponed to cognate descendants of a nearer line. Then again, the son's and the grandson's daughter's son ought to inherit, according to the doctrine of spiritual benefit, immediately after the daughter's son of the deceased. But the author of the Dayabhaga has placed 'the

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[1] 13 Weekly Reporter, Full Bench, 61.

father' immediately after the daughter's son of the deceased.[1] It is contended that the Dayabhaga, in declaring that "if there be no daughter's son, the succession devolves on the father," does not intend that the son's and the grandson's daughter's son should inherit *immediately after* the daughter's son.

LECTURE XIV.

Not precisely stated in the Dayabhaga.

If the language of the Dayabhaga *really* be so 'precise' that it is impossible to introduce the cognate kinsmen between the agnate sapindas of a nearer line and those of a remoter line, then the objection set forth above should certainly be entitled to considerable weight. If the author of the Dayabhaga has *expressly* excluded them from the position which, according to the doctrine of spiritual benefit, naturally belongs to them, we are bound to accept his dictum, and treat the cognate sapindas as *exceptions* to the religious principle upon which, we are repeatedly assured, the whole theory of inheritance depends.

Have they been excluded by Jimutavahana from their appropriate places?

Before, however, taking it for granted that the cognate sapindas have been excluded by Jimutavahana from their appropriate places, let us examine again the texts of the Dayabhaga according to which the cognate kinsmen, it is contended, have been denied their just rights.

First, as regards the cognate sapindas of the father's, the grandfather's, and the great grandfather's line:

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[1] Dayabhaga, XI, 3. 1, 3.

LECTURE XIV.

"On failure of heirs of the father down to the great grandson, it must be understood that the succession devolves on the father's daughter's son, in like manner as it descends to the owner's daughter's son.

"The succession of the grandfather's and great grandfather's lineal descendants, including the daughter's son, must be understood, in a similar manner, according to the proximity of the funeral offering."[1]

In default of the agnate descendants of the father, his daughter's son inherits. The Dayabhaga then proceeds to say that the agnate descendants of the grandfather, together with 'the daughter's son,' are entitled to inherit, "in a similar manner, according to the proximity of the funeral oblation." What is here in the language of the Dayabhaga to justify the contention that "the precise position which the cognate sapindas would be entitled to hold according to the principle of spiritual benefit, would interfere with that which has been assigned by the author of the Dayabhaga to some of the heirs specified in the earlier part of Chapter XI?" The utmost that can be said is, that some of the heirs—namely, the brother's and the nephew's daughter's son in the father's line; the grandfather, and his son's and grandson's daughter's son in the grandfather's line; and the great grandfather, and his son's and grandson's daughter's son in the great grandfather's line

The question answered in the negative.

[1] Dayabhaga, XI, 6, 8, 9.

—are not specifically mentioned. There is nothing in the language of the Dayabhaga to exclude them from their natural places. As the cognate kinsmen are not *specially* mentioned as heirs, neither are the grandfather and the great grandfather specifically enumerated as entitled to inherit. No one would ever dream of excluding the grandfather and the great grandfather from the positions which, according to the doctrine of spiritual benefits, should appropriatly belong to them.[1] If the grandfather and the great grandfather are not excluded, although their names do not occur as heirs, why should the claims of cognate kinsmen, who are equally entitled to inherit according to the same principle, be rejected as heirs? The Dayabhaga, instead of closing the lines of heirs in the respective branches of the father, grandfather, and the great grandfather, have, it seems to us, purposely left room for the cognate sapindas of each branch to come in in their appropriate places. It was not his intention to close the line of heirs. It is quite clear that he did not wish that a single individual should be excluded who was competent to satisfy all the requirements of the spiritual principle. As regards the order of succession, Jimutavahana was clearly of opinion that the nearer the oblation the greater the preference. In other words, the cognate sapindas of a nearer line excluded even the agnate sapindas of a remoter line.

[1] Dayabhaga, XI, 4. 4, 6.

LECTURE XIV.

Son of son's daughter, and son of grandson's daughter, successively come in as heirs after the daughter's son

though not mentioned by Jimutavahana.

The son of a son's daughter and of a grandson's daughter are entitled to the succession *immediately* after the daughter's son of the deceased. But the Dayabhaga says,—"In default of the daughter's son, the right to inherit accrues to the father."[1] Here the son's daughter's son and the grandson's daughter's son have been passed over. Jimutavahana must have declared the succession of the father in such terms on the supposition that neither his own daughter's son, nor the daughter's son of his son, or grandson, survived the deceased. "In default of the daughter's son" then means "in default of his own daughter's son, his son's daughter's son, and his grandson's daughter's son." That this explanation of the term 'in default of,' is *not unusual*, but is fully in accordance with the language made use of by the author of the Dayabhaga in other parts of his treatise, may be seen from the following passage:

"*In default of* kindred who might present oblations in which he would participate, the succession should devolve on the maternal uncle and the rest who present oblations which he was bound to offer."[2]

Again, "In default of the father's daughter's son or other person who is a giver of three oblations which the deceased shares, or which he was bound to offer, the succession devolves, in the next place, on the maternal uncle and others."[3]

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[1] Dayabhaga, XI, 3, 1. [2] XI, 6, 13. [3] XI, 6, 20.

Here it will be noticed that Jimutavahana, in declaring that the maternal uncle takes the heritage *immediately after* the agnate and cognate descendants of the great grandfather, has passed over the *maternal grandfather*. It cannot be said that it was not the intention of the author of the Dayabhaga that the inheritance should devolve upon *the maternal grandfather* before the maternal uncle. All the expounders and followers of the Dayabhaga place the maternal grandfather immediately after the agnate and cognate sapindas, in whose ancestral oblations the deceased has a right of participation.[1]

It is clear then that Jimutavahana, in declaring that, "in default of the daughter's son, the right accrues to the father," has, by no means, prohibited the son's and the grandson's daughter's son from inheriting the property of the deceased owner. The father is the next heir after the daughter's son, on failure of a son's daughter's son, or of a grandson's daughter's son.

Thus we see that there is nothing in the language of the Dayabhaga to justify us in excluding the cognate sapindas of a nearer line in favor of the agnate kinsmen of a remoter line. The objection then, that "the precise position which the

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[1] Raghunandana's Dayatattwa, 11, 69-70; Srikrishna Tarkalankara's Commentary on the Dayabhaga, Chap. XI, Summary; Dayakrama Sangraha, I, 10, 14; and Jagannatha's Digest (Colebrooke's Digest), Vol. II, p. 567.

LECTURE XIV.

cognate sapindas would be entitled to hold, according to the principle of spiritual benfit, would interfere with that which has been assigned by the author of the Dayabhaga to some of the heirs specified in the earlier part of Chapter XI," falls entirely to the ground. The fact is, Jimutavahana never intended that there should be any limitation whatever with regard to the preferable right of cognate sapindas. The very object of his treatise is to extend the operation of the spiritual principle to the cognate sapindas of the family. Had it been his intention to postpone the cognate sapindas to the agnate kinsmen, he would never have admitted the father's, the grandfather's, and the great grandfather's daughter's son *immediately after* the agnate relatives of each line. In all cases, the order of succession is regulated, according to Jimutavahana, by the proximity of the funeral offering.[1] "It is reasonable," says he, "that the wealth which a man has acquired should be made beneficial to him by appropriating it according to the degree in which services are rendered to him."[2]

Order of cognate sapindas as given in the Dayabhaga examined by the Calcutta High Court.

It is but right to tell you that the principles explained to you above have been strongly controverted by the Calcutta High Court.[3] Let us

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[1] Dayabhaga, XI, 6, 9. [2] XI, 6, 31.

[3] Gobind Prosaud Taluqdar, 15 Bengal Law Reports, 35; Juggut Narain Singh *v.* The Collector of Manbhoom, I. L. R., 4 Calc., 413; *In re* Oodoy Churn Mitter, I. L. R., 4 Calc., 411; Kashee Mohun Roy *v.* Raj Gobind Chuckerbutty, 24 Weekly Reporter, 229.

examine, with due deference, the arguments upon which the decision of the High Court is based.

LECTURE XIV.

In a suit[1] disputing the succession to the property of C. P., deceased, the plaintiffs were his brother's daughter's sons, and the defendants his paternal grandfather's great grandsons.

In *Gobind Prosaud* v. *Mohesh Chunder*.

Adopting the principle of the Full Bench decision in the case of *Guru Gobind Saha Mundul* v. *Anund Lal Ghose Mozoomdar*,[2] the Court felt bound to consider which of the parties confer the greatest amount of spiritual benefit on the deceased. Accordingly it was found, that the defendants offer one oblation in which the deceased participates, *viz.*, to his grandfather and their great grandfather ; and that the plaintiffs offer two, *viz.*, to his father and grandfather, being their (maternal) great grandfather and great great grandfather. But as these are maternal ancestors of the plaintiffs, whilst the oblation of the defendants is offered to a paternal ancestor, and the latter is of superior religious efficacy (the difference of number being no ground of preference where, as here, the cakes are not of the same description), *it was held*, that the defendants were to be preferred to the plaintiffs, and were the heirs of C. P., deceased."[3]

Paternal grandfather's great grandsons preferred to brother's daughter's son.

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[1] Gobind Prosaud Taluqdar *v.* Mohesh Chunder Surma Ghuttak, 23 Weekly Reporter, 117.

[2] 13 Weekly Reporter, Full Bench, 49.

[3] 23 Weekly Reporter, 117.

Lecture XIV.

This decision was based on the following passage from Jagannatha's Digest: "The oblations presented to the maternal grandfather and the rest are secondary, because they must follow funeral cakes offered to paternal ancestors; the son of a granddaughter can have no claim while the giver or sharer of a principal oblation exists. Nor should it be objected as a consequence, that the son of the late proprietor's daughter, or of his father's daughter, and so forth, could have no title, if any kinsman within the degree of *sapinda* were living. The Mahabharata showing that a daughter's son procures advantage even by his birth alone, it appears that he does confer important benefits."[1]

In *Guru Gobind Saha* v. *Anund Lal Ghose.*

In *Guru Gobind Saha Mundul* v. *Anund Lal Ghose Mozoomdar*, referred to above, the question was, whether, under the Hindu law current in the Bengal School, the son of a paternal uncle's daughter is entitled to succeed to the estate of a deceased Hindu, if no nearer heirs are forthcoming. In this case, the following propositions were illustrated and enforced:

Four propositions laid down.

1. Inheritance is in right of benefits conferred.

2. Among the *sapindas*, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned

[1] 2 Colebrooke's Digest, 567.

for the distinction is, that the first kind of cakes are of superior religious efficacy in comparison to the second. LECTURE XIV.

3. Similarly, those who offer a larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description.

4. Where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones.

The principle laid down in this case by the Full Bench was not disputed by Sir Richard Couch in his judgment in the case of *Gobind Persad Talukdar* v. *Mohesh Chunder Surma Ghuttack*. But the question was, whether the difference of number is a ground of preference, where, as here, the cakes are not of the same description. The oblations offered to paternal ancestors, the Court argued, were of superior religious efficacy than the secondary cakes offered to maternal ancestors. Those that offered the former description of cakes should be preferred to cognate kinsmen who offered the latter.

According to this theory, not a *single* cognate kinsman should inherit so long as there is an aguate kinsman, giving undivided oblations, who can claim the inheritance. The cognate kinsmen give secondary *pindas;* therefore they are of inferior rank to those who give superior pindas. The

Lecture XIV.

brother's daughter's son, the uncle's daughter's son, and the rest are all cognate kinsmen who give only secondary pindas ; they should, therefore, be postponed to all the agnate kinsmen who give undivided oblations to the paternal ancestors of the deceased.

If this principle be adopted, then the author of the Dayabhaga must be wrong in placing the daughter's son before the father, and the father's and the grandfather's daughter's son before the grandfather and the great grandfather. The learned Judge extricates himself from this difficulty by observing,—" It is true that the author of the Dayabhaga makes three *exceptions* to this order of succession in the father's, grandfather's, and great grandfather's daughter's son, *but a special reason is given for it, which is not applicable to others.*"[1]

High Court's decision in the former case commented on as incorrect.

The learned Judge takes no notice here of the *exception* made in favor of the daughter's son. But let that pass. Let us see what '*special reasons*' are given in making the *three* exceptions referred to above :

" On failure of heirs of the father down to the great grandson, it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle), in like manner as it descends to the owner's daughter's son (on failure of the male issue, in preference to the brother).[2]

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[1] 23 Weekly Reporter, 121. [2] Dayabhaga, XI, 6, 8.

"The succession of the grandfather's and great grandfather's lineal descendants, including the daughter's son, must be understood, in a similar manner, *according to the proximity of the funeral offering;* since the reason stated in the text 'for even the son of a daughter delivers him in the next world, like the son of a son,' is equally applicable; and his father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss, by offering oblations, of which he may partake."[1]

Here we find that the *only reason* given for the succession of the father's, grandfather's, and the great grandfather's daughter's son is, that they "offer oblations of which the deceased may partake." Their order of succession is determined "according to the proximity of the funeral offerings;" and this proximity of funeral offering has reference to the deceased himself and his nearer ancestors. In *all cases* "the proximity of the funeral offering" should determine the order of succession. The father's daughter's son offers oblations to a *nearer* ancestor, the father, than the descendants of the grandfather, who offer oblations to a remote ancestor, the grandfather. The father's daughter's son, therefore, should be preferred to the uncle and others. Similarly, the grandfather's daughter's son should be

[1] Dayabhaga, XI, 6, 9.

LECTURE XIV.

preferred to the grand-uncle and the other descendants of the great grandfather.

We do not find then any '*special reason*' for which 'three exceptions are made' in favor of the father's, grandfather's, and the great grandfather's daughter's son. Jimutavahana nowhere says that the cognate kinsmen of the same family should inherit after *all* the agnate heirs are exhausted. Nor, in discussing the position which should be assigned to the father's, grandfather's, and the great grandfather's daughter's son, does he specially mention that they form 'exceptions' to the operation of the general principle laid down by him. The father's, the grandfather's, and the great grandfather's daughter's son are brought in as heirs, and their respective positions in the father's, grandfather's, and the great grandfather's lines are given to them in the ordinary course of illustrating the general principle that inheritance is in right of benefits conferred, and that the order of succession should be regulated "according to the proximity of the funeral offering." They inherit in preference to the descendants of remoter ancestors, because they give oblations to nearer ancestors of the deceased.

Disputed questions as to the preferential claim of two or more competitors.

In a previous part of his treatise, Jimutavahana, as I have pointed out to you, had laid down that, in a competition between the nephew and the uncle, the brother's son has a superior claim, because he

presents an oblation to the late proprietor's father, *who is the person principally considered.* Even the brother's grandson excludes the uncle, *for he is a giver of oblations to the deceased owner's father, who is the person principally considered.*[1] Here we find again that "the proximity of the funeral offering" regulates the order of succession.

LECTURE XIV.

e.g., between nephew and uncle

That Jimutavahana was of opinion that the cognate kinsmen of a nearer line should exclude the ancestors and their descendants of remoter lines, is clearly seen in the following illustration given by him. The question was, whether the father should be preferred to the daughter's son. He answers the question in the negative, and declares, that "the father's right of succession should be after the daughter's son, and before the mother; for the father, offering two oblations of food to other manes in which the deceased participates, is inferior to the daughter's son, who presents one oblation to the deceased, and two to other manes in which the deceased participates."[2]

Or between father and daughter's son

Here there was a competition between the cognate kinsman of one line and the progenitor himself of another line. When the progenitor himself was postponed to the cognate kinsman of a nearer line, there could be no question that his descendants, who derive their claim *through* him, would be excluded by the cognate kinsman of a nearer line. How is

Resolved by the degree of benefits conferred by pindas

Nearer cognate kinsmen preferred

[1] Dayabhaga, XI, 6. 5-6.

[2] XI, 3. 3.

LECTURE XIV.

to remote agnate.

it that the author of the Dayabhaga prefers a cognate kinsman, who gives secondry oblations, to an ancestor who gives undivided oblations in which the deceased participates? How is it that no distinction is made between the secondary pinda of a nearer line and a superior pinda of a remoter line? Jimutavahana was well aware of the *secondary* character of the oblations given by cognate kinsmen.

Pindas divided into three classes: 1, direct; 2, participated; 3, obligatory.

He has divided the *pindas* into three classes: 1*st*, those given *directly* to the deceased himself; 2*nd*, those given to his paternal ancestors in which he participates; and 3*rd*, those given to maternal ancestors, which he was bound to give, but in which he does not participate.[1] He repeatedly illustrates and enforces the principle, that so long as there is a single kinsman who offers the first class of pindas, he inherits to the exclusion of a giver of the second class of oblations.

The classification made in order of merit.

The giver of a *direct* pinda is preferred to the giver of a *shared pinda* presented to his paternal ancestors; and the latter excludes the giver of a pinda to his maternal ancestors, in which he does not participate. An oblation given to a maternal ancestor is an *inferior* and a *secondary pinda*, and he who presents it should be excluded by the giver of a participable pinda to the paternal ancestor.[2]

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[1] Dayabhaga, XI, 1. 38; 3. 3; 5. 3, 12; 6. 9, 12-13.

[2] XI, 3. 3; 6. 12-13.

Although Jimutavahana, then, was well aware of the 'secondary' character of "the oblation offered to maternal ancestors," and of the superior character of "the oblations offered to paternal ancestors," still he prefers the giver of a secondary pinda to the giver of a superior pinda.

Lecture XIV.

Value of the pindas offered by rival claimants, whether agnate or cognate kinsmen, determines their right of succession.

The fact is, the 'superior' and the 'inferior' character of a pinda, if it be one in which the deceased participates, is to be taken into consideration merely in determining the order of succession between the agnate and cognate heirs of the same line. In the same line, the agnate kinsmen are to be preferred to the cognate heirs. But if there be a competition between the cognate heir of a *nearer* line and the agnate heir of a *remoter* line, the former should be preferred to the latter.

To sum up—

Recapitulation.

Pindas are of three descriptions:

1. Those presented directly to the deceased.

The son, the grandson, and the great grandson—these three agnate descendants are entitled to give pindas at the parvana obsequies.

The daughter's son, the son's daughter's son, and the grandson's daughter's son—these three cognate descendants are also competent to perform the parvana rites in honor of the deceased. The oblations given by cognate descendants are *secondary* pindas.

2. The pindas offered to the three paternal ancestors and participated in by the deceased.

Lecture XIV.

The parvana oblations offered to the three immediate paternal ancestors of the late owner, by his collateral kinsmen, *viz.*, the three agnate descendants of the father, the grandfather, and the great grandfather, are participated in by the owner after his death.[1]

The pindas conferred on the paternal ancestors by the daughter's son, son's daughter's son, and the grandson's daughter's son of each are also shared by the deceased. But these pindas given to the paternal ancestors by their cognate descendants are of an inferior character.[2]

3. The pindas which the deceased was bound to give to his three immediate maternal ancestors.

There was a moral obligation to give those oblations which the deceased owed to his maternal ancestors. There is this difference between these and the direct and participable pindas, that, in the latter, the deceased has a right of participation, while, in the former, he has *no* right of participation whatever.[3]

Although the deceased has no right of participation in the oblations presented to his maternal ancestors, still, inasmuch as the three immediate maternal ancestors received oblations from him, and the agnate and cognate descendants of each offered *pindas* which the deceased was bound to

[1] Dayabhaga, XI, 1-38. [2] XI, 6. 9.
[3] XI, 5-12 ; 6, 12-13.

give, there is thus a heritable bond between him and his maternal kinsmen. LECTURE XIV.

The pindas given by the agnate descendants of each maternal ancestor were of greater efficacy than those conferred by the cognate descendants of the ancestors. Their preferable right, therefore, as regards succession to the property of the late owner, is to be determined with reference to the superior or inferior character of the exequial cakes presented by them to the maternal ancestors of the deceased.

The pindas then, as I said before, are of three descriptions: The first description of pindas confers the largest amount of spiritual benefit, and are, therefore, preferred to the second. The second description of pindas again confers a greater amount of benefit than the third, because the pindas offered to the paternal ancestors, and participated in by the deceased, are more efficacious than those which the deceased was bound to give to his maternal ancestors. The second description of pindas, therefore, is preferred to the third.

Each of these description of pindas again may be subdivided into two classes :—

(*a*) Those presented by agnate descendants;

(*b*) Those presented by cognate descendants.

In each of these two classes, the first class (*a*) of pindas is preferred to the second class (*b*).

The kinsmen who give, and those who receive,

these three descriptions of pindas are known as sapindas, and they are the heirs of the deceased proprietor.

The sapinda heirs are divided as follows:

I. The male descendants who confer the largest amount of spiritual benefit on the deceased by presenting to him the first description of pindas—

(*a*) The male agnate descendants related within three degrees of consanguinity to the deceased;

(*b*) The male cognate descendants within three heritable degrees.

II. The three immediate paternal ancestors to whom are offered, and their descendants who offer, the second description of pindas.

These descendants are divided into—

(*a*) The male agnate descendants related within three degrees of consanguinity to the common paternal ancestors;

(*b*) Male cognate descendants related within three degrees of consanguinity to common ancestors.

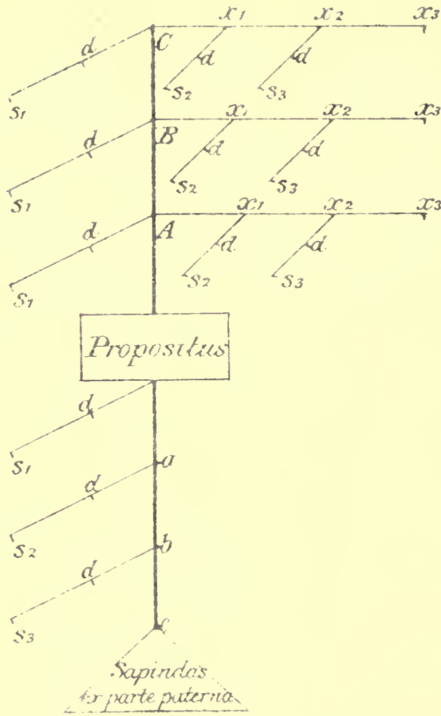
III. The three male maternal ancestors who receive, and their descendants who give, the third description of pindas.

These descendants again are divided, as above, into—

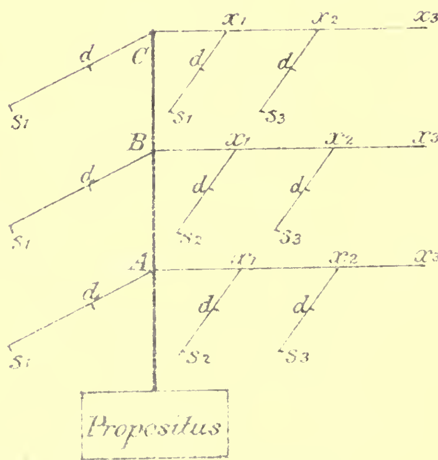
(*a*) Male agnate descendants related within three degrees of consanguinity to a common ancestor;

(*b*) Male cognate descendants within three degrees, &c.

I



II



Sapindas ex parte materna.

N.B.—Heirs within three degrees of consanguinity alone are admitted in the scale of succession. The fourth in descent and ascent are rigidly excluded as *sapinda heirs;* though in the paternal line, they are admitted as *sakulya* heirs.

LECTURE XIV.

In the two last classes, it should be distinctly borne in mind, that the following rules are universally applicable:—

1. The nearer ancestor and his descendants exclude the more remote ancestor and his descendants.

2. In each class the heir who gives the largest number of pindas of the same description [bearing always in mind the two subdivisions (*a*) and (*b*)] to the common ancestor or ancestors, is preferred to him who gives a less number of pindas to the common ancestor or ancestors.

The two annexed tables will make this clear:—

We see that, according to the Dayabhaga, there are seven groups of sapinda heirs.

Sapinda heirs arranged into seven groups.

Table I.

Sapinda heirs 'ex parte paterna'

I. The deceased proprietor's group.

a Son.

b Grandson.

c Great grandson.

Cognate descendants.

$P—s_1$		Daughter's son.	
$b—s_2$	Son's	,,	,,
$c—s_3$	Grandson's	,,	,,

LECTURE XIV.

II. Father's group.

A Father.

Agnate descendants of father.

$A—x_1$ Brother.

$A—x_2$ Brother's son.

$A—x_3$,, grandson.

Cognate descendants of father.

$A—s_1$ Father's daughter's son.

$A—s_2$ Brother's daughter's son.

$A—s_3$ Brother's son's daughter's son.

III. Grandfather's group.

B Grandfather.

Agnate descendants of grandfather.

$B—x_1$ Grandfather's son.

$B—x_2$,, grandson.

$B—x_3$,, great grandson.

Cognate descendants of grandfather.

$B—s_1$ Grandfather's daughter's son.

$B—s_2$,, son's daughter's son.

$B—s_3$,, grandson's ,, ,,

IV. Great grandfather's group.

C Great grandfather.

Agnate descendants of great grandfather.

$C—x_1$ Great grandfather's son.

$C—x_2$,, ,, grandson.

$C—x_3$,, ,, great grandson.

Cognate descendants of great grandfather.

$C—s_1$ Great grandfather's daughter's son.

$C—s_2$ „ „ son's daughter's son.

$C—s_3$ „ „ grandson's „ „

Table II.

Sapinda heirs 'ex parte materna.'

V. Maternal grandfather's group.

A Maternal grandfather.

Agnate descendants of maternal grandfather.

$A—x_1$ Maternal grandfather's son.

$A—x_2$ „ „ grandson.

$A—x_3$ „ „ great grandson.

Cognate descendants of maternal grandfather.

Maternal grandfather's daughter's son.

„ „ son's daughter's son.

„ „ grandson's „ „

VI. Maternal great grandfather's group.

VII. Maternal great great grandfather's group.

You will observe that not a single female heir has been mentioned in any of the groups given above. As a general rule, females, according to Hindu law, have no right of inheritance. The widow, the daughter, the mother, the grandmother, and the great grandmother are exceptions to this general rule. But their right of inheritance is subject to certain *special* rules. "Baudhayana, after premising 'a woman is entitled,' proceeds not to the

Lecture XIV.

heritage; for females and persons deficient in an organ of sense or member are deemed incompetent to inherit. The construction of the passage is, a woman is not entitled to the heritage. But the succession of the widow and certain others (*viz.*, the daughter, the mother, paternal grandmother, and the paternal great grandmother) takes effect under express texts without any contradiction to this maxim."[1]

The widow succeeds after the great grandson; the daughter, after the widow; the mother, in default of the father; the grandmother, in default of the grandfather; and the great grandmother, on failure of the great grandfather.

[1] Dayabhaga, XI, 6, 11. Ram Nath Tolapatro *v.* Durga Sundari Debi, I. L. R., 4 Calc., 550.

LECTURE XV.

PRINCIPLES OF SUCCESSION UNDER THE DAYABHAGA LAW.—

(Continued.)

II.



Who inherits in default of sapindas? — Passages quoted in answer — Summarized by Srikrishna Tarkalankara — Sakulyas — Subdivided into two classes — *Propinquous*, or connected through divided oblations — The last term includes in its sweep "descendants of the daughters of the same family," — *e.g.*, daughter's son's son — Order of succession among the *samanodakas* governed by the same principle as succession among the *sapindas* — Principles of consanguinity and competency to perform exequial rites determine the right of inheritance — Are the cognates postponed to *all* the agnates? — Does the Mitakshara determine heirs solely by the test of propinquity? — Mr. Mayne's treatment of the question — 'Any benefit' is a sufficient foundation of the title to inherit — Spiritual principles applicable to the Benares school — Illustrated by example — Points of agreement and difference between the Bengal and Benares Schools noted *en passant* — Daughter's son; his case exceptional — Priority of mother's claim over that of father accounted for — 1. Philologically — 2. Sentimentally — 3. Physiologically — Not on religious ground — Bandhus take their place as heirs after the agnates are exhausted (Mitakshara) — Father's cognate kindred on his mother's side; their rights founded not only on affinity, but also on their competency to perform sradha rites — Sacrificial offering a mere evidence of right — Intimate connection between the inheritor of property and the performer of sacrifices — Preference of right determined by the sacrificial test — Affinity the sole basis of inheritance in Bengal and Benares Schools — Religious test applicable to both schools in settling rival claims — Difference between the two schools consists in the interpretation of a religious *dictum* anent the comparative efficacy of oblations offered by the agnate and cognate kinsmen — Doctrine of religious efficacy accepted by the lawyers of the Benares School — Viramitrodaya; authority of its exposition on doubtful points.

Let us resume to-day our exposition of the principles of succession under the Dayabhaga Law: I will explain to you in the course of the lecture the points of resemblance between the theory of

LECTURE XV.

spiritual benefit and the doctrine of affinity as applied to the law of inheritance. You will then see that the two doctrines, instead of being hostile, are complementary to each other.

Who inherits in default of sapindas?

In default of *sapindas ex parte materna*, SAKULYAS are entitled to the inheritance. "A *sakulya* (or distant kinsman)," says the Dayabhaga, "is the descendant of the paternal grandfather's grandfather, or other remote ancestor. Such relatives are denominated samanodakas. Their order of succession is in the series as exhibited. On failure of such heirs (down to the samanodaka), the succession devolves on the spiritual preceptor, the pupil, &c."[1]

Passages quoted in answer.

Speaking of the heritable right of the distant kinsmen, the author of the Dayabhaga remarks again: "On failure of kin in this degree (kindred on the mother's side), the distant kinsman (sakulya) is successor. For Manu says, 'Then, on failure of such kindred, the distant kinsman shall be the heir, or the spiritual preceptor, or the pupil.'[2] The distant kinsman (sakulya) is one who shares a divided oblation, as the grandson's grandson or other descendant within three degrees reckoned from him; or as the offspring of the grandfather's grandfather, or other remoter ancestor.

"Among these claimants (whether ascending or descending), the grandson's grandson and the rest are nearest, since they confer benefits by means of

[1] Dayabhaga, XI, 6, 15.

[2] IX, 187.

the residue of oblations which they offer. (These descendants are, therefore, heirs.) On failure of such, the offspring of the paternal grandfather's grandfather inherits in right of oblations presented to the paternal grandfather's grandfather and other ancestors who are sharers of the residue of oblations which the deceased was bound to offer.

"If there be no such distant kindred, the samanodakas, or kinsmen allied by a common libation of water, must be admitted to inherit, as being signified by the term *Sakulya*.

"On failure of these, the spiritual preceptor (or instructor in the knowledge of the Veda) is the successor. In default of him, the pupil (or student of the Veda) is heir. On failure of him likewise, the fellow-student.

"In default of these claimants, persons bearing the same family name (gotra) are heirs. On failure of them, persons descended from the same patriarch (*pravara*) are the successors.

"On failure of all heirs as here specified, let the priests take the estate. Thus Manu says,—'On failure of all these, the lawful heirs are such Brahmanas as have read the three Vedas, as are pure in body and mind, and as have subdued their passions.' Thus virtue is not lost. Virtue, which would be extinguished by the ample enjoyment (of its reward), but is renewed by the acquisition of fresh merit, through the circumstance of his wealth

LECTURE XV. devolving on Brahmanas, is not lost. Here also the author indicates the appropriation of the property for the benefit of the deceased.

"In default of them, the king shall take the wealth, excepting, however, the property of a Brahmana. A failure of descendants from the same patriarch and of persons bearing the same family name, as well as of Brahmanas, must be understood as occurring when there are none inhabiting the same village; else an escheat to the king could never happen."[1]

Jimutavahana reverts again to the succession of *strangers*, and says:—"Excepting the property of a Brahmana, let the king take the wealth (on failure of heirs). So Manu directs,—'the property of a Brahmana shall never be taken by the king: this is a fixed law. But the wealth of the other classes, on failure of all (heirs), the king may take.' By the term 'all' is signified every heir including the Brahmana.

"The goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil, and the holy preceptor take. On failure of these, the associate in holiness, or person belonging to the same order, shall inherit. Thus Yajnavalkya says,—'The heirs of a hermit, of an ascetic, and of a professed student are, in their order, the preceptor, the virtuous pupil, and the spiritual brother and associate in holiness.'

[1] Dayabhaga, XI. 6, 21—28.

Lecture XV.

"Goods, such as they may happen to possess, should be delivered in the inverse order of this enumeration. The student must be understood to be a professed one: for abandoning his father and relations, he makes a vow of service and of dwelling for life in his preceptor's family. But the property of a temporary student would be inherited by his father and other relations."[1]

Summarized by Srikrishna Tarkalankara.

Srikrishna Tarkalankara, the well-known commentator of the Dayabhaga, has thus summarized these results:—

"On failure of these (sapindas *ex parte materna*), the right of inheritance accrues to the remote kindred in the descending line, who present the residue of oblations to ancestors with whom the deceased owner may participate,—namely, to the grandson's grandson and other descendants for three generations in succession. In default of these, the inheritance returns to the ascending line of distant kindred, by whom oblations are offered, of which the deceased owner may partake,—namely, to the offspring of the paternal grandfather's grandfather and other ancestors in the order of proximity. On failure of these, the succession devolves on the *Samanodakas*, or kindred allied by a common libation of water. In default of them, the spiritual preceptor is heir; or if he be dead, the pupil; or failing him, the fellow-sutdent in theology. If there be none,

[1] Dayabhaga, XI, 6, 34—36.

Lecture XV.

the inheritance devolves successively on a person bearing the family name and one descended from the same patriarch, in either case being an inhabitant of the same village. On failure of all relatives as here specified (the property devolves on Brahmanas learned in the three Vedas, and endowed with other requisite qualities; and in default of such), the king shall take the escheat, excepting, however, the property of a Brahmana. But the priests who have read the three Vedas, and possess other requisite qualities, shall take the wealth of a deceased Brahmana.

"So the goods of an anchoret shall devolve on another hermit considered as his brother, and serving the same holy place. In like manner, the goods of an ascetic shall be inherited by the virtuous pupil; and the preceptor shall obtain the goods of a professed student. But the wealth of a temporary student is taken by his father and other heirs."

Sakulyas.

There is one passage in the extract given above from the Dayabhaga, to which I would draw your particular attention. On failure of paternal kindred connected by funeral oblations, the Sapindas *ex parte materna* take the heritage. After them the Sakulyas are heirs. The right of inheritance next accrues to the Samanodakas. This is settled law according to the Dayabhaga. There can be no question as to who the Sakulyas are. The Dayabhaga and its followers have clearly defined them.

But great doubt has been expressed about the exact meaning which was given by Jimutavahana to the word 'Samanodaka.' LECTURE XV.

In one place[1] he says,—"the relation of Samanodakas ends only where birth and family name are no longer known."[2] We find him again thus remarking in another place,—"such relatives (Sakulyas) are denominated Samanodakas."[3] In one of the extracts given above, he says again,—"the word 'Samanodaka' is signified by the term 'Sakulya.'"[4]

Before we analyze these passages, let us attempt a *literatim* translation of them :

"Manu ordains : 'On failure of such kindred (sapindas), the *sakulya* shall be the heir, or the spiritual preceptor, or the pupil.'[5] The descendants of the paternal grandfather's grandfather, &c., as well as the *samanodakas*, are declared to be *sakulyas.* The order of succession among them shall be according to the order of enumeration (given above)."[6]

"But on failure of kin down to this degree (maternal kindred), the *sakulya* is successor. The *sakulya* is one who shares a divided oblation, as the grandson's grandson or other descendant within three degrees reckoned from him ; or the offspring

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[1] Dayabhaga, XI, 1, 42.

[2] The definition of *Samanodaka* given here was not evidently accepted by Jimutavahana as the true definition of the term. See XI, 1, 39—42.

[3] Dayabhaga, XI, 6, 15. [4] XI, 6, 23. [5] IX, 187. [6] XI, 6.15.

Lecture XV.

of the grandfather's grandfather, &c. On failure of sakulyas of this description, *the samanodakas, comprehended in the term 'sakulya,' must be admitted to inherit.*"[1]

On the words italicised, Srikrishna remarks: "The samanodakas must be taken to be included in the term 'sakulya,' because they also have sprung from the same family. Although both classes of heirs (near sakulyas, and samanodakas or remote sakulyas) are included in the same term, their order of succession is regulated by the degree of benefit conferred. This is the meaning."

Subdivided into two classes.

If we combine all these passages together, it is clear that, in the opinion of the author of the Dayabhaga, the kinsmen known as Samanodakas were included in the term 'Sakulyas.' In other words, the Sakulyas are of two descriptions—*propinquous*, and remote. The following kinsmen are propinquous Sakulyas, being connected with the deceased through presentation of *divided oblations.*

Propinquous, or connected through divided oblations.

(*a*) Great grandson's son.

" " grandson.

" " great grandson.

(*b*) 1. Great grandfather's father.

His son.

" grandson.

" great grandson.

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[1] Dayabhaga, XI, 6, 21.

2. Great grandfather's grandfather.
His son.
„ grandson.
„ great grandson.
3. Great grandfather's great grandfather.
His son.
„ grandson.
„ great grandson.

The persons enumerated above have been particularly mentioned as *sakulyas* by Jimutavahana. It would seem, however, from the wording of the Dayabhaga, that *all* persons who presented divided oblations to the deceased, who received divided oblations from him, and who presented divided oblations (to common ancestors) in which the deceased had a right of participation, were also known as sakulyas. This is not all. The descendants of those ancestors to whom the deceased presented divided oblations were also his sakulyas, because the late owner had also a right of participation in the pindas (undivided or divided) which these descendants presented to common ancestors.[1]

Thus it would appear that the following persons indicated in the subjoined table were known as near sakulyas.

[1] Dayabhaga, XI, 1, 38.

पिण्डे यथा परस्परभोक्तृत्वं तथा लेपे तुल्यन्यायात् ।

Raghunandana's Suddhitattva, 495.

LECTURE XV.

In the subjoined table d' e' f' in the descending line, A—y_1, y_2, y_3 ; B—y_1, y_2, y_3 ; C—y_1, y_2, y_3 are all sakulyas. D, E, F are also sakulyas. Their descendants D—x_1, x_2, x_3 ; E—x_1, x_2, x_3 ; F—x_1, x_2, x_3; and D—y_1, y_2, y_3 ; E—y_1, y_2, y_3 ; F—y_1, y_2, y_3 are also denominated near sakulyas.

This is not all ; D—s_1, s_2, s_3 ; E—s_1, s_2, s_3 ; and F—s_1, s_2, s_3 are also sakulyas.

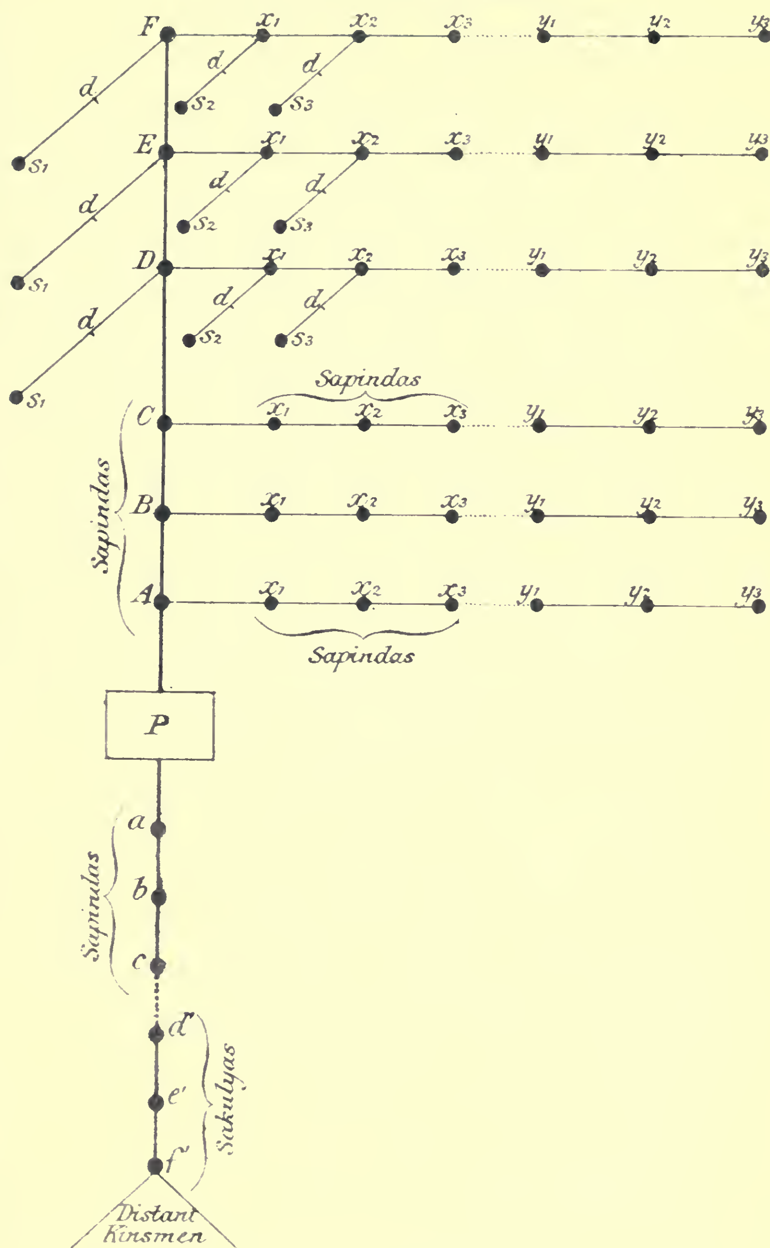
These are the cognate descendants in the lines of D, E, and F. They present *parvana* oblations to D, E, and F, to whom the deceased also presented divided oblations during his lifetime. The owner, after his death, has a right of participation in the oblations presented to these ancestors.[1]

Here the near sakulyas are exhausted. But who the remote sakulyas are, is a matter of considerable doubt. The next class of heirs after the near *sakulyas* are the samanodakas ; and Jimutavahana says, that they are also denominated 'sakulyas.' The near sakulyas have been mentioned already. It stands to reason, therefore, that the samanodakas are the remote *sakulyas*, or remote kinsmen allied by the family. Every person who is competent to present 'the water' must not be considered as an heir. The canon relating to 'libations of water' declares, that every person is competent to present

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[1] 2 Colebrooke's Digest, 568.

SAKULYA KINSMEN.



N. B. For explanations of the Table, see ante page 510 *i*.

the water to every other being, from the lowest creature on earth to God in heaven. LECTURE XV.

Every created being therefore, according to the *Tarpana* canon, is entitled to a handful of water from us. Though every person who presents 'the water' is, properly speaking, a *samanodaka* of the deceased, the law of inheritance has given a limited signification to the term. Among the *samanodakas* those alone are entitled to the inheritance who are also 'sakulyas,' or allied by the family with the deceased. *That samanodaka* alone is competent to inherit *who* belongs to the same *kula*, or family, of the deceased.

Now Jimutavahana does not confine the term *kula* to the agnatic family alone. The cognate kinsmen, the male descendants of the daughters of the family, known as *bandhus* in the Mitakshara, have been declared by him to belong also to the *kula* of the deceased.[1] It will be found, by referring to XI, vi, 19, that the kinsmen *ex parte materna* have been excluded from the connotation of the word *kula*, but all the *bandhus* sprung from the family of the deceased have been comprehended under the word *kula*. Those who bear the same gotra, or family name, are said to be sprung from the same *kula*, as well as those

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[1] यो यस्तत्कुलोत्पन्नोऽतद्गोत्रोऽपि स्वदौहित्रपितृदौहित्रादिः अतत्कुलोत्पन्नो वा मातुलादिः &c., XI, 6, 19.

LECTURE XV.

who, though they do not bear the same family name, are sprung from the *same line*. In other words, remote agnate kinsmen, and the persons known as bandhus or cognate kinsmen in the descending and collateral lines, can be also said to be sprung from *the same family*.

The last term includes in its sweep "descendants of the daughters of the same family."

If our interpretation of the word 'samanodaka' be correct, it would follow that *certain* male descendants of the daughters of the family are entitled to inheritance. It would follow, I mean, that, according to the Dayabhaga, the daughter's son's son and similar cognate kinsmen are also heirs.

e.g., daughter's son's son.

It may be said, however, that the daughter's son's son has been expressly excluded from the succession, because, says Jimutavahana, "he is not the giver of a funeral oblation." It "ceases with the daughter's son."[1] The case of the daughter's son's son is a crucial case in point. If he be excluded from succession altogether, the other *bandhus*, whose heritable right we have been advocating, could on no consideration be admitted as heirs.

From the text of the Dayabhaga quoted above, it would certainly appear *at first sight* that, in the opinion of Jimutavahana, the daughter's son's son is *not* in the line of heirs. A little consideration will, however, show that the author of the Dayabhaga *never* intended to exclude the daughter's

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[1] Dayabhaga, XI, 2. 2.

son's son from the succession *altogether*. Jimutavahana is discussing the *preferable* right of a sapinda to succession. The daughter's son is a sapinda heir, but his son is not so. He is *not in the line of sapinda heirs*, because he is not competent to offer an oblation. The daughter's son's son is not a sapinda heir, it is true; and not coming under the class of *sapindas*, he cannot inherit as a *sapinda* kinsman. As he is not a sapinda, he must be excluded from the class of sapinda heirs, and cannot claim inheritance immediately after his father.

On the same principle, the great grandson's son, not being a sapinda heir, is 'debarred' from inheritance. "To three must libations of water be made; to three must oblations of food be presented; the fourth in descent is the giver of those offerings, but the fifth has no concern with them."[1] "The fifth in descent then not being connected even by a single oblation, is not an heir, so long as a person connected by a single oblation, whether sprung from the father's or mother's family, exists."[2] The great grandson's son, we see here, was excluded from succession as a sapinda heir, but has been declared to be in the line of heirs as a sakulya.[3]

Mitra Misra, the great expounder of the Mitakshara principles of inheritance, said with reference to the

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[1] Manu, IX, 186. [2] XI, 6, 17; XI, 6, 7; XI, 1, 40. [3] XI, 6, 21-22.

heritable right of the grandson's grandson: "It is to be borne in mind that the cessation of the right of the great great grandson and the like who are further removed than the great grandson, refers to them as *sapindas*; for, as *sakulyas*, they are certainly entitled to succeed according to proximity."[1] What the Viramitrodaya said with reference to the heritable right of the grandson's grandson, we may say with regard to the heritable right of the daughter's grandson. His right is *not* extinguished, but is merely postponed. He does not succeed so long as a person connected by a single undivided or divided oblation exists, but he takes his natural place as an heir among samanodakas or remote sakulyas as soon as the *sapindas* and the propinquious sakulyas are exhausted. He cannot take the heritage as a sapinda, or a near sakulya, but it devolves upon him as a samanodaka or remote sakulya. The samanodakas come in as heirs, says the Dayabhaga, after the near sakulyas have been exhausted. The daughter's son's son is a *sakulya samanodaka*, or a kinsman connected by an 'equal libation of water,' and is allied to the deceased by his family. The daughter's grandson, therefore, and similar cognate kinsmen *ex parte paterna* receive the heritage in default of nearer heirs. That Jimutavahana intended to exclude these kinsmen from the line of heirs, cannot be proved from the Dayabhaga.

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[1] Viramitrodaya, III, 1, 11.

If the daughter's grandson and similar *bandhus* could be admitted as heirs by the text of the Dayabhaga, a crying injustice would be removed from the Bengal system of jurisprudence. No one would ever dream of gainsaying that, according to the Dayabhaga, the fourteenth in descent of the fourteenth ancestor is entitled to the succession. But if you say that the *third* in descent from the proprietor himself, through his daughter, is entitled to the succession, you will be told at once that the language of the Dayabhaga forbids such an unwarrantable supposition. This is really carrying out the 'spiritual principle' with a vengeance! In speaking of the samanodakas, Jagannatha says: "Among these, the eighth ancestor, and his son, grandson, great grandson, *daughter's son and the rest*, as far as the fourteenth in descent counted from the eighth ancestor, successively claim the inheritance; the same must be understood in respect of the ninth ancestor and the rest; for nearness of kin and superior benefits are entitled to respect in every case. Men connected by equal libations of water are allied by family; and on failure of such kinsmen as partake of the remains of funeral cakes, those who are connected by equal oblations of water are heirs, as suggested by the term 'kinsmen allied by family,' for it is so remarked by Jimutavahana."[1]

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[1] Colebrooke's Digest, Vol. II, 569.

LECTURE XV.

Jagannatha, it will be seen, does not exclude the cognate descendants from the line of heirs known as samanodakas. On what ground has he admitted cognate descendants as heirs? It cannot be on any other ground except that they have sprung from the same family, and present 'libations of water' to the ancestors of the deceased. Only two conditions then are necessary to entitle a kinsman to be ranked as a *samanodaka* heir. He must present the water, and be 'allied by the family.' Both these conditions are met with in the daughter's grandson. On what ground then can he be excluded from succession? Even by the principle of spiritual benefit he ought to take his natural place as heir of his father's maternal grandfather.

Order of succession among the *samanodakas* governed by the same principle as succession among the *sapindas.*

If you carefully examine the Dayabhaga, you will perceive, as I pointed out to you before, that Jimutavahana, instead of ignoring the heritable rights of cognate kinsmen, was exceedingly anxious that no great distinction should be made between them and the agnate kinsmen. They should inherit together, according to their order of proximity to the deceased, and their right must not be postponed till *all* the agnate relatives have been exhausted. He was solicitous that the cognate sapindas should take the inheritance immediately after the agnate sapindas of the same line have been exhausted. He spent all the force of his logic to bring about this desirable result. Even the traditional interpretation of

Lecture XV.

Yajnavalkya's words — *gotraja, bandhu* — was not accepted by him, because it militated against his theory that the cognate kinsmen should inherit according to their *proximity* to the deceased. The Mitakshara and its followers say, that the words *gotraja*, 'gentiles,' and *bandhu*, 'cognates,' are separate terms. *Gotrajas*, according to them, mean agnate sapindas and samanodakas; and *bhandhus*, cognate sapindas. If that be the interpretation, then you have no other course left but to postpone the cognates to the agnates. Jimutavahana demurred to this. He says: "Accordingly Manu has not separately propounded their (of cognate sapindas) right of inheritance; for they are comprehended under the two passages, 'To three must libations of water be made, &c.,' and 'To the nearest kinsman the inheritance next belongs.'[1] Yajnavalkya, likewise, uses the term *gotraja* (sprung from the family) for the purpose of indicating the right of inheritance of the daughter's son of the father, &c., *as sprung from the same line*, in the relative order of the funeral oblation; and for the further purpose of excluding females related as sapindas (wives of sapindas), since these are *not* sprung from the same line."[2] The Mitakshara uses the words *gotraja* and *bandhu* as two separate words unconnected with each other, and denoting two different classes of individuals—the agnates and cognates. The Dayabhaga takes

[1] Manu, IX, 186, 187. [2] XI, 6, 10.

LECTURE XV. — the word *gotraja* to mean agnate *and* cognate descendants of the *same* lines; and *bandhus*, according to Jimutavahana, probably mean maternal kindred only.[1] Here it will be observed that Jimutavahana did not scruple to give a forced interpretation to the word *gotraja*, in order to strengthen his argument in favor of cognate sapindas.

If the principle be admitted that cognate kinsmen are comprehended under the term *samanodakas*, and that, as such, they are entitled to the inheritance, there will be no difficulty in finding out the exact number of cognate kinsmen who should be recognised as heirs. Raghunandana, by declaring that the three classes of the Mitakshara bandhus are in the line of heirs, has virtually fixed a limit to the number of cognate kinsmen who should be entitled to the inheritance.

As the author of the Dayabhaga has not given us any interpretation of the term *samanodaka* himself, we shall be justified in consulting other writers of the Bengal School, who have followed in the footsteps of Jimutavahana, for an explanation of the term. We have seen that Srikrishna takes it to mean 'remote sakulyas,' or persons who are sprung from the same family, but whose right of inheritance is postponed to the near sakulyas who

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[1] For different cannotations of the term '*Bandhus*,' see Dayabhaga, IV, iii, 29 ; X, 8 ; XI, vi. 12, 28.

confer a larger amount of benefit on the deceased. Let us see now what Raghunandana says on the subject:

"We have the authority of Haralata for saying that the relation of *samanodakas* ends only where birth and family-name are no longer known. Samanodakas are kinsmen who come in *after* the partakers of divided oblations. If the details regarding the descent of a given person from a common ancestor are known, or if it is known in a general manner that he is simply sprung from the family, he is reckoned as a samanodaka."[1]

Here we see that Raghunandana does not commit himself to any particular opinion. *Any person who is sprung from the family is a samanodaka*, this is what the Haralata says; but Raghunandana does not tell us whether he accepts this as the true definition of a samanodaka. From the manner, however, in which the definition is quoted, it would seem that Raghunandana agreed with the author of the Haralata that all kinsmen who can trace their descent from a common ancestor *in the family* should be known as samanodakas.

Let us now turn to the chapter on inheritance in the Dayatattva:

"On failure of brothers, *gotrajas* are heirs. In default of them, the succession devolves on the

[1] Suddhitattwa, 495. This definition of *Samanodaka* probably refers only to mourning, &c., and *not* to inheritance.

LECTURE XV.

maternal kindred. On failure of them the sakulyas, or kinsmen connected by divided oblations, take the heritage.

"The term *bandhus* in the text of Vrihaspati —'where there are many sapindas, sakulyas, as well as bhandhus, he who among these is the nearest succeeds to the estate of one who leaves no children'—shows, that the bandhus of the owner, of his father, and of his mother are entitled to inheritance."[1]

It will be observed that Raghunandana makes no mention whatever of the samanodakas as a class of heirs. He should have mentioned the samanodakas immediately after the sakulyas; but, instead of doing so, he simply says, that all the *three classes of bandhus* of the Mitakshara are entitled to the inheritance.

He evidently believed, like the author of the Dayabhaga, that the term 'samanodaka' is comprehended under the word 'sakulya,' and that all the samanodaka heirs are, properly speaking, sakulya heirs. He has specially mentioned the near sakulyas as heirs, and has left us to infer that the samanodakas or the remote sakulyas must, as a matter of course, inherit after them.

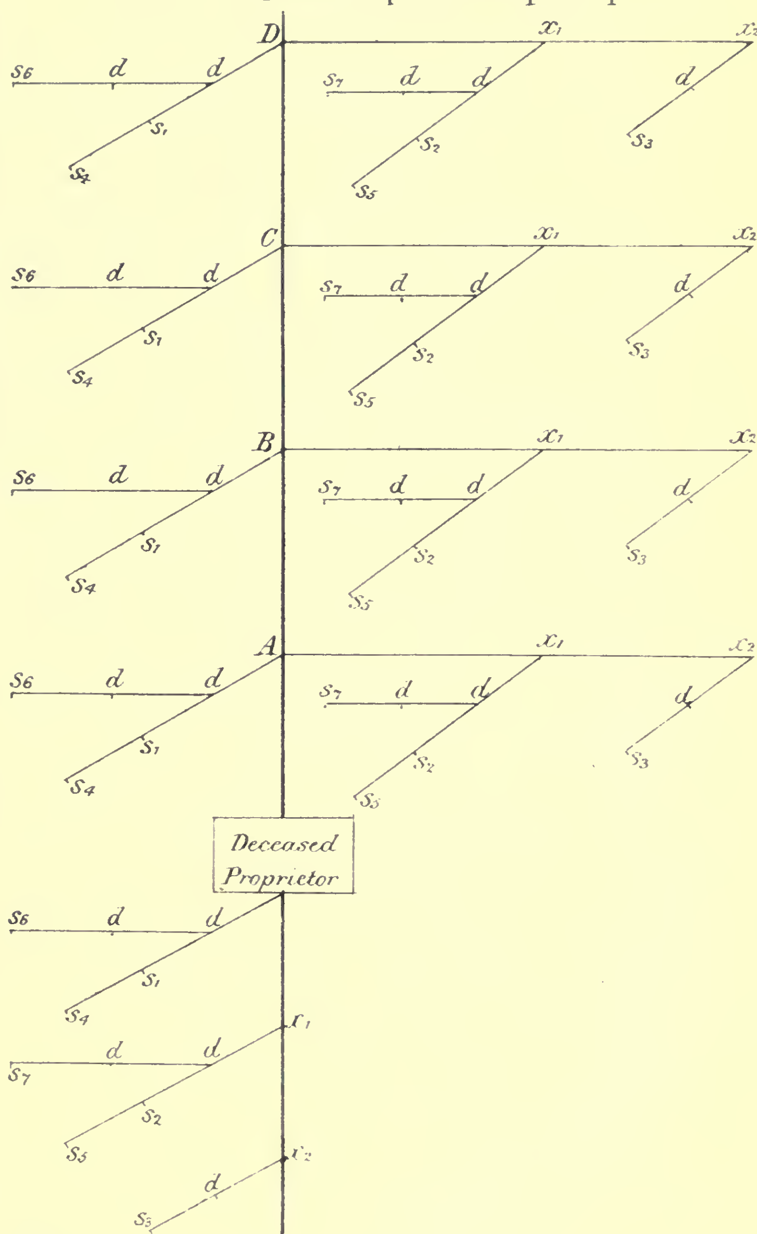
The exact words of the well-known text of the Mitakshara in which the three classes of bandhus

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[1] Dayatattwa, 425.

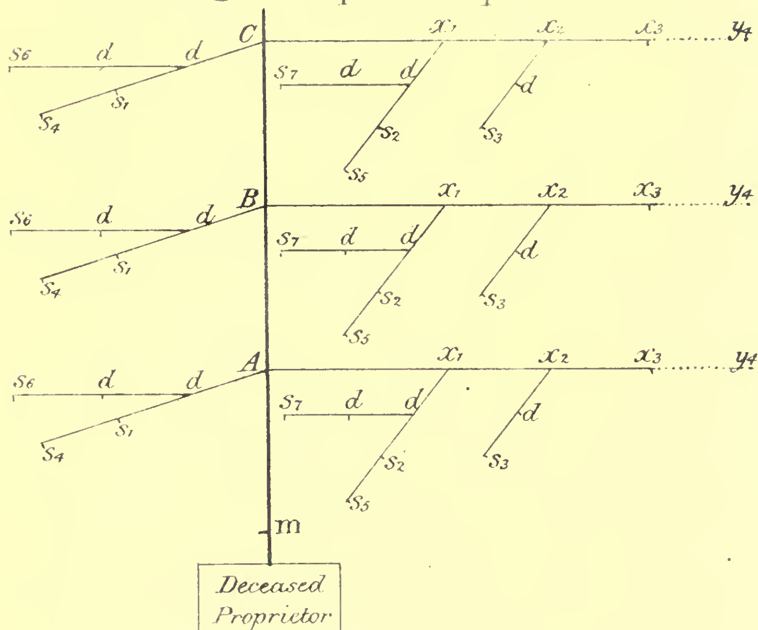
I(a) MITAKSHARA—BANDHUS.

Owner's Cognate Sapindas Ex parte paterna.

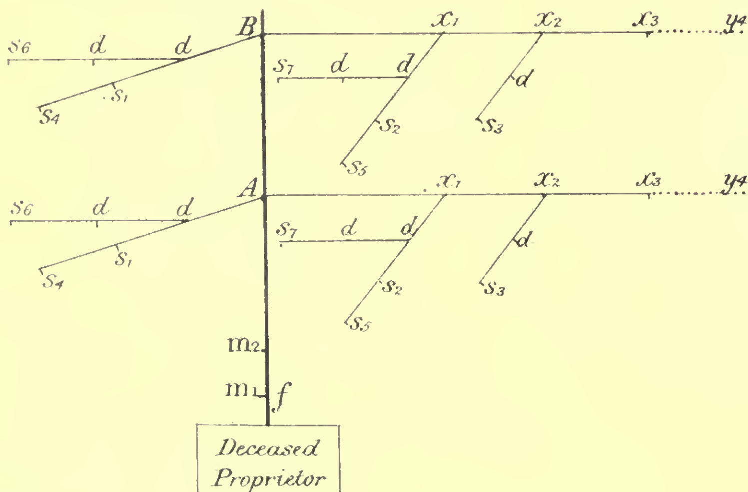


I(b) MITAKSHARA—BANDHUS.

Owner's Cognate Sapindas Ex parte materna.



II. FATHER'S BANDHUS.
III. MOTHER'S Do.



are enumerated have been quoted, evidently for the purpose of showing that those kinsmen, connected through females, who have not already been placed among gotrajas as heirs, should be recognised as heirs. It would certainly follow from the words of Raghunandana that bandhus as a class are entitled to the heritable right. Most of the bandhus enumerated by him had been provided for already, because they were connected with the deceased by *parvana* oblations. Others who are not so connected are declared to be heirs.—On what ground ? It can be no other ground than this: they are competent, as *samanodakas*, to spiritually benefit the deceased.

According to Raghunandana you should remember, the samanodakas are competent to perform the exequial rites of the deceased, and as such they are entitled to the inheritance. The logical consequence of admitting the three classes of the Mitakshara *bandhus* as heirs will be, that a certain, number of kinsmen, who are connected with the deceased through females of the family, must be declared as heirs. We have shown at length in a previous lecture who these bandhus are; and if you once admit that *bandhus* are heirs, you have no other alternative but to introduce the Mitakshara system into the Dayabhaga, with modifications suited to the peculiar doctrine of inheritance accepted in the Bengal School. That Raghunandana was of this opinion there cannot be the shadow of a doubt.

LECTURE XV.

The Privy Council also has repeatedly laid it down that the Mitakshara should be referred to in Bengal for an exposition of the principles of inheritance in cases "where the Dayabhaga is silent."[1]

As the recognition of the rights of remote cognate kinsmen is not opposed to the principles of inheritance enunciated by the Dayabhaga, and as Raghunandana declares that the three classes of the Mitakshara bandhus, or cognate kinsmen, are in the line of heirs, we are justified in referring to the Mitakshara for an exposition of the term *bandhu*. We know the cognate kinsmen to whom the heritable right accrues as *bandhus* under the Mitakshara law. Those cognate kinsmen then that have not been already provided for as heirs by the Dayabhaga should now take the heritage; and the order of succession among them should be regulated by the degree of benefit conferred by them on the deceased owner.

Before I leave this subject, I should like to direct your attention to the remarks of Jagannatha on the heritable right of the bandhus as enunciated by Raghunandana:

"On failure of persons descended from the same primitive stock, a kinsman *in general* is heir; and by that term is meant a relation of the deceased himself, of his father, or of his mother. The sons of his own father's sister, and those of his own

[1] Moniram Kolita *v.* Kerry Kolitanee, &c., I. L. R., 5 Calc., 776.

maternal uncle, must be considered as his own kinsmen. In like manner there are kinsmen of the father and of the mother, such as their father's sister's sons, mother's sister's children, and maternal uncle's issue ; these take the succession in order.

"Here authors deduce from the form of succession delivered by Jimutavahana, that, on failure of kinsmen allied by the funeral cake, or by family *name*, the son of the father's maternal uncle, or of the father's sister, or of the mother's maternal uncle, or of the mother's sister, are likewise heirs. This is not accurate, for, since these are inferior to the father's maternal grandfather and mother's maternal grandfather and others, it is improper, without the authority of express law, to affirm the title of the father's maternal uncle's son and the rest ; and the word (*bandhu*) being taken in its accepted sense, obviously signifies the kinsmen of the proprietor himself; and their title is in effect thereby established: this we hold reasonable."[1]

These remarks need no comments from us. Jagannatha is evidently commenting on the text of Raghunandana whether *bandhus* are in the line of heirs. Jagannatha is of opinion that *all* the three classes of *bandhus* should not be recognised as heirs. The first class of bandhus, the owner's *own* bandhus only, should obtain the heritable right. The reason assigned by him, however, for his opinion, has

[1] 2 Colebrooke's Digest, 570.

Lecture XV.

been declared by the highest judicial authority as ineffective. "The list of bandhus given in the Mitakshara," says the Privy Council, "is not exhaustive, but simply illustrative." "The father's maternal grandfather and mother's maternal grandfather and others" are thus in the line of heirs. We have "the authority of express law, then, to affirm the title of the father's maternal uncle's son and the rest." Jagannatha does not deny that "it can be deduced from the form of succession delivered by Jimutavahana," that the succession should devolve on *bandhus* on failure of nearer kinsmen. He only contends, like Apararka, that the owner's *own* bandhus alone should be entitled to the inheritance, and that the other two classes of bandhus should be excluded. Even with regard to this he does not appear to be quite consistent in his opinion. For, immediately before making this statement, he said, that "these (the three classes of bandhus) take the succession in order." Be that as it may, this much is certain, that the Mitakshara bandhus, as a class, are entitled to the heritage in the Dayabhaga School, on failure of nearer heirs.

Principles of consanguinity and competency to perform exequial rites determine the right of inheritance.

The whole burden of the theory of spiritual benefit in the Dayabhaga would appear to be nothing more nor less than the establishment of an infallible principle by means of which the cognate kinsmen may be brought in as heirs immediately after the agnate kinsmen of the same line. It would be a

great mistake to suppose that Jimutavahana excluded altogether the rule of consanguinity from his system of inheritance. If you critically examine the chapter on the "Succession to the estate of one who leaves no male issue," it will be abundantly clear to you in almost every line that the blood consideration was weighing upon his mind at every step of his proceeding: "The nearer excludes the more remote;" "the agnate excludes the cognate of the same line;" "the nearer line excludes the remoter line;" "the maternal kinsmen are excluded by the paternal kinsmen." These and similar other dogmas are met with in almost every page. "If the right of succession is grounded solely on benefits conferred, should not the paternal uncle and the nephew, according to your theory," asks a captious critic, "be entitled to succession at one and the same time?" Both of them present two oblations to common ancestors. Here the author of the Dayabhaga was placed in a position of difficulty. He got out of his difficulty by arguing in effect, that because the nephew belongs to a nearer line, and is more nearly related than the uncle, who belongs to a remoter line, the uncle, therefore, is excluded by the nephew. In this instance the relationship to the father, who is principally benefited, should decide the contest. Here "the owner's father is principally considered."[1] Turn which way you will, you

[1] Dayabhaga, XI, 6-5.

LECTURE XV.

will find clear traces of the fact that, according to the great Bengal legislator, the right of succession was grounded on blood relationship, and the principle of spiritual benefit merely regulated the order of succession.[1] Look at the list of heirs given by the Dayabhaga ; from the *son* to the *samanodakas*, all of them are heirs. Do you find even one here who is acknowledged as heir, and who is not bound by ties of blood with the deceased proprietor? The father-in-law and the son-in-law are, according to the S′ráddha canon, competent to perform the exequial rites of the deceased. Are they entitled to inheritance? Even a *friend* may present the pinda to him, but is he acknowledged as an heir? Of the brothers, only the eldest is competent to perform the s′ráddha; does he exclude the other brothers? It is needless to multiply examples. If you compare the Table of Inheritance with the list of the persons competent to celebrate the s′ráddha rites, you will be struck with the fact, that so long as there is a single person who can show propinquity of blood, the succession devolves on him to the exclusion of strangers, or persons who are *strangers* to all intents and purposes.

I would particularly direct your attention to the heritable right of the *sagotras*, or persons bearing the same family name. They are competent to pre-

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[1] See Dayabhaga, XI, 5, 3 ; Dayatattva, XI, 63 ; Colebrooke's Digest, Vol. II, 565.

sent the cake immediately after the samanodakas. Thus, if their heritable right be measured by their religious merit, they should be ranked as heirs next to the kinsmen known as samanodakas, and before the maternal kinsmen; or, if the superior efficacy of *parvana* oblations be taken into consideration, the *sagotras* should, at any rate, be ranked as heirs immediately after maternal kinsmen and sakulyas. But do they really do so? They may bear the *family name*, but they are scarcely *relations* at all. Their religious offerings may possess spiritual efficacy, but their affinity is of the most attenuated character. All *sagotras*, again, may not necessarily be descended from the same ancestor. Persons belonging to *different castes* have often the same *gotra*. They could not surely have been the descendants of the same ancestor. Thus, except *sagotras* of the same caste, most of such persons have not the remotest blood-relationship, and are, therefore, utter strangers. The author of the Dayabhaga has not, therefore, given them heritable rights in preference to maternal kinsmen and others whose affinity is greater than that of these persons entitled sagotras. Jimutavahana is of opinion that even the 'spiritual preceptor,' 'the pupil,' and 'the fellow-student' may be said to be more nearly allied, by ties of affection and gratitude, to the deceased than these remote kinsmen. He has, therefore, excluded them from inheritance till the

LECTURE XV.

claims of those persons who are more nearly related to the deceased owner have been satisfied. Thus we see that religious considerations did not entirely guide Jimutavahana in fixing the order of succession. The principle of community in religious offerings certainly tested heirship, or rather, speaking more correctly, the presentation of religious offerings was strong evidence of preferable right, but the religious principle did not admit a single person into the line of nearer heirs who was not allied to the deceased by consanguinity.

The succession of strangers is exceptional. It is exceptional not only in the Bengal School, but also in those schools where the system of inheritance is admittedly based on 'affinity only.' So long as there is a single person who can show any affinity, 'strangers' are strictly excluded to admit the former. The Dayabhaga does in this respect greater justice to blood-relations than the Mitakshara and the works which follow its authority. The bandhus, according to the Mitakshara, are not entitled to inheritance before the samanodakas. Thus, the fiftieth in descent from the fiftieth ancestor, "if he can trace his name and lineage to a common ancestor," would be admitted as an heir before the sister's son. He must be bold indeed who would affirm that the former candidate for heirship is a nearer blood-relation than the sister's son. The trace of common blood in the

veins of the former is very faint, and yet, by the logical result of the doctrine of affinity, he would be a preferable heir with the author of the Mitakshara and his followers. The so-called religious principle of Jimutavahana supports the claims of nearer kinsmen to be classed as heirs with far greater logical force than the doctrine of affinity of the Mitakshara School.

Are the cognates postponed to *all* the agnates?

The distinction between agnate and cognate kinsmen is not of so marked a character, thought Jimutavahana, as to justify us in postponing the cognates to *all* the agnates. Suppose a male and a female were in the same degree of relationship to the deceased. Should their male descendants divide the property in equal shares? No, let due consideration be shown to the agnatic blood, and let the agnate kinsman inherit, in this case, before the cognate. But suppose the fourth in descent from the sixth ancestor disputes the heritable claim of the father's sister's son;[1] or the seventh in descent from the seventh ancestor wishes to exclude the maternal first cousin as heir;[2] who should in these cases be the preferable claimant? The invariable answer of the Mitakshara lawyers will be,—"The Mitakshara law is against the claim of any relation through a female until *all* the agnate kinsmen have been exhausted. The maternal first

[1] Thakur Jib Nath Sing v. The Court of Wards, 5 Beng. Law Rep., 442.

[2] Rutchputty Dutt Jha v. Rajendra Narain Roy, 2 Sutherland's Privy Council Rep., 1.

LECTURE XV.

cousin and the father's sister's son, therefore, should be excluded, and the great grandfather's great grandfather's great grandson's great grandson in one case, and the grandfather's great grandfather's great grandson in the other, should be preferred as heirs." These were actual cases which came before the British Courts for decision. The British Judges were, of course, bound by the text-law, and they decided in favor of the remote kindred, who were utter *strangers* to all intents and purposes, in preference to nearer relations through females. In the cases referred to above, who, we may be bold to ask, advocated with greater justice the doctrine of affinity? Was it Jimutavahana, who would, without the least hesitation, have preferred the nearer kinsmen; or the author of the Mitakshara, who decided against them? There was no conceivable community of corporal particles in the cases given, and yet the agnates received the heritage. Very well might the followers of Jimutavahana exclaim, "Our system of inheritance is based on affinity only, while yours is grounded on shadowy metaphysical considerations, which ought not to find a place in a Code of positive Law. It is propinquity—and propinquity alone—which is our test of heirship ; but you, who profess to base your system on community of corporal particles, are swayed by principles which in their working do considerable injustice to the nearer and dearer blood relations."

LECTURE XV.

Does the Mitakshara determine heirs solely by the test of propinquity?

It has been said that the spiritual considerations find no place in the Mitakshara system. Propinquity, and not religious merit, was the watchword of the author of the Mitakshara. We often hear the followers of the affinity-doctrine say, that the Mitakshara system is unmeaning and inexplicable on the religious principle. By no ingenious interpretation of the religious principle can it be shown, that persons who never confer any spiritual benefits should be entitled to inherit; and it is beyond question, they tell us, that kinsmen who confer high religious benefits are postponed to persons who confer hardly any. Persons who confer none whatever are admitted as heirs for no other reason than that of affinity. The claims of rival heirs are determined by the test of propinquity, and not by that of religious efficacy.[1] If, instead of applying the religious principle, we apply the "reason of near affinity," the Mitakshara system appears to be, they say, as simple as possible.[2]

These statements do not appear to us to be quite correct. The Mitakshara system is perfectly intelligible and consistent, if we apply "the reason of religious efficacy"—more so in fact than the system of Jimutavahana, which is avowedly based on religious offerings. Let us examine the Mitakshara system of inheritance, and see who are those persons that, though their spiritual offerings possess

[1] Mayne's Hindu Law, 433. [2] *Ibid*, 437.

"religious efficacy of the most attenuated character," are preferred to kinsmen who confer high religious benefits; and also note those persons who, though they confer no spiritual benefits at all, are yet admitted as heirs for no other reason than that of affinity.

Mr. Mayne's treatment of the question.

Mr. Mayne, the eminent lawyer, whose words we have quoted above, is evidently speaking here of the exclusion of cognate sapindas by agnate kinsmen, and of the admission of father's and mother's *bandhus* as heirs.

"A Hindu," says he, "may present three distinct sorts of offerings to his deceased ancestors; either the entire funeral cake, which is called an undivided oblation, or the fragments of that cake which remain on his hands, and are wiped off it, which is called a divided oblation, or a mere libation."[1]

This is quite correct; but we should like to supplement it with a little further information regarding religious offerings in their connection with the law of inheritance.

'Any' benefit is a sufficient foundation of the title to inherit.

Mr. Mayne is evidently of opinion that, according to the religious principle, the benefits conferred through the oblation of the funeral cake in the *parvana* constitute the *sole* ground on which rests the right of succession to the property left by a man. The *parvana* cakes certainly determine the preference of heirs, but do not extinguish the right of those persons who are only competent to perform

[1] Mayne's Hindu Law, 424.

other descriptions of s'ráddha in honor of the deceased. *Any benefit* whatever is a sufficient foundation of the title to inherit. The pupils, the sagotras, and the rest, says Jagannatha,[1] though not conferring *parvana* benefits, *do* succeed to the property left by a man. The persons who offer the *parvana* cakes are preferred to those who confer any other description of spiritual benefit; but in the absence of these *parvana oblators*, the performers of what are called *individual* s'ráddhas are equally entitled to succeed.

The *parvana* cakes, you should remember, are of two classes. The cakes presented by agnate kinsmen, and those which are offered by cognate kinsmen. The latter class of pindas are of a very inferior character. "In the double set of oblations (*parvana*)," says Jagannatha, "it is indispensably necessary that the son should perform the s'ráddha for the paternal line, not for the line of his maternal grandfather; but it is simply reprehensible in one who performs the *s'ráddha* for the paternal ancestors, not to perform it also for the maternal grandfather and his progenitors. Consequently, since the s'ráddha may be performed without noticing the maternal grandfather's line in a subordinate set of oblations and the like, the s'ráddha for the maternal ancestors is not requisite to the obsequies performed in the dark fortnight of *Aswina*."[2]

[1] Colebrooke's Digest, Vol. II, 544. [2] *Ibid*, 394.

LECTURE XV.

We thus see that it is quite *optional* with the oblator to give *parvana* cakes to his maternal ancestors or not. He may perform the ceremony or may not do so. It is not *obligatory* on him to celebrate the *parvana* rites in honor of his maternal ancestors. He may omit the rites altogether. If he presents such oblations, they do not possess the same religious efficacy as those offered by agnate kinsmen. These oblations may, therefore, be left out of consideration altogether. If any comparison be instituted between the *parvana* oblations presented by agnate kinsmen, and the offerings given by the sons of daughters, it will be found that the former confer superior benefits, and that there are no points of resemblance whatever between the two descriptions of *pindas*. "The oblations presented to the maternal grandfather and the rest," says Jagannatha, "are secondary, because they must follow funeral cakes offered to paternal ancestors." Practically also, when the *parvana* rites are performed, the maternal ancestors are not honored as a rule when the *parvana* is celebrated. It is the three immediate paternal ancestors alone whose names are celebrated, and who receive separate oblations. The names of maternal ancestors are seldom taken except on particular occasions. I do not mean to say that the names of the maternal ancestors are omitted on *all* occasions, but it cannot be gainsaid that, on *most* of these occasions, the maternal progenitors do not receive a share of

exequial cakes. A separate *parvana* is held in honor of maternal ancestors alone, on the first lunar day in the light fortnight in the month of Asvina. The maternal ancestors are then exclusively honored, and this s'ráddha is, therefore, entitled the *dauhitra s'ráddha*, or the funeral feast in honor of maternal progenitors. Be that as it may, the *pindas* presented by sons of daughters of the family are of a very inferior character, and for the purposes of inheritance they rank next to the oblations presented by agnate kinsmen. The undivided oblations, or the remains of these offerings, which may be given by the agnates at the *parvana* are of superior religious efficacy, and no comparison whatever can be held between these and the oblations given by cognate kinsmen. The *parvana* oblations given by agnate *sapindas* do, of course, take the first rank; nay even other descriptions of offerings, according to some teachers, presented by the agnates, known as samanodakas and sagotras, rank higher than the *inferior* optional *parvana pindas* offered by the sons of daughters of the family. Manu makes no mention whatever of maternal ancestors in laying down his canons of the sraddha rites.[1] The later legislators enjoin, it is true, the duty of offering cakes to the maternal ancestors, but they are careful to impress

[1] Manu enjoins oblations to be presented by sons of *appointed* daughters to their maternal ancestors, when taking the heritage. See Manu, IX, 132, 136.

Lecture XV.

upon our mind that these descriptions of offerings are 'secondary,' and that a broad distinction should be made between the pindas given by the agnates and the cognates.

Spiritual principles applicable to the Benares school.

Let us bear these facts in mind, and apply the doctrine of spiritual benefits in interpreting the Mitakshara table of inheritance. Before we do so, however, I would draw your attention to the two following tables in which the persons competent to perform the *s'ráddha* rites, and the kinsmen entitled to inheritance in the Benares and Bengal Schools, are placed side by side. You will be able to trace at a glance, in these tables, the intimate connection between ancestor-worship and the principles of inheritance in these Schools of Hindu law, which are said to be diametrically opposite to each other:—

BENARES SCHOOL.

SRADDHA:

a. PARVANA, OR ANCESTRAL.

b. EKODDISHTA, OR INDIVIDUAL.

PARVANA.

1. Son.
2. Grandson.
3. Great grandson.
4. Daughter's son.
5. Son's daughter's son.
6. Grandson's daughter's son.

SRADDHA—*contd.*

EKODDISHTA.

1. Son.
   - *a.* Eldest son.
   - *b.* Second son, &c.
   - *c.* Adopted son.
2. Grandson.
3. Great grandson.
4. *Widow.*
5. *Daughter.*
   - *a.* Married.
   - *b.* Unmarried.

BENARES SCHOOL.—(*Continued.*)

SRADDHA (Ekoddishta)—*contd.*

6. Daughter's son.
7. Brother.
    - a. Whole brother.
        1. Younger.
        2. Elder.
    - b. Halfbrother.
        1. Younger.
        2. Elder.
8. Brother's son.
9. Father.
10. *Mother.*
11. *Son's widow.*
12. *Sister.*
13. Sister's son.
14. Sapindas *ex parte paterna.*
    - a. Uncle.
    - b. Uncle's son, and others.
15. Samanodakas.
16. Sagotras, or kinsmen bearing the same family name.
17. Sapindas *ex parte materna.*
    - a. Maternal grandfather.
    - b. Maternal uncle.
    - c. Maternal uncle's son, and others.

SRADDHA (Ekoddishta)—*contd.*

18. Bandhus.
    - a. Father's sister's son.
    - b. Mother's sister's son.
19. Father's bandhus.
    - a. Father's father's sister's son.
    - b. Father's mother's sister's son.
    - c. Father's maternal uncle's son.
20. Mother's bandhus.
    - a. Mother's father's sister's son.
    - b. Mother's mother's sister's son.
    - c. Mother's maternal uncle's son.
21. Strangers.
    - a. Pupil.
    - b. Son-in-law.
    - c. Father-in-law.
    - d. Friend.
    - e. KING, except of a Brahmana.

INHERITANCE.

1. Son.
2. Grandson.
3. Great grandson.
4. *Widow.*

LECTURE XV.

BENARES SCHOOL.—(*Concluded.*)

INHERITANCE—*contd.*

5. *Daughter.*
   - *a.* Unmarried.
   - *b.* Married.
     1. Unprovided.
     2. Enriched.
6. Daughter's son.
7. *Mother.*
8. Father.
9. Brother.
   - *a.* Whole brother.
     1. Associated.
     2. Unassociated.
   - *b.* Halfbrother.
     1. Associated.
     2. Unassociated.

   An unassociated whole brother and an associated halfbrother share the estate equally.

INHERITANCE—*contd.*

10. Brother's son.
11. Sapindas *ex parte paterna.*
    - *a.* *Grandmother.*
    - *b.* Grandfather.
    - *c.* Uncle and other sapindas up to the seventh degree.
12. SAMANODAKAS.
13. Bandhus.
    - *a.* His own.
    - *b.* Father's.
    - *c.* Mother's.
14. Strangers.
    - *a.* Pupil.
    - *b.* Fellow-student.
    - *c.* Learned priest.
    - *d.* Any Brahmana.
    - *e.* KING.

BENGAL SCHOOL.

SRADDHA:

a. PARVANA, OR ANCESTRAL.
b. EKODDISHTA, OR INDIVIDUAL.

PARVANA.

1. Son.
2. Grandson.
3. Great grandson.
4. Daughter's son.
5. Son's daughter's son.

SRADDHA (Parvana)—*contd.*

6. Grandson's daughter's son.

EKODDISHTA.

1. Son.
   - *a.* Eldest son.
   - *b.* Youngest son.
2. Grandson.
3. Great grandson.

BENGAL SCHOOL.—(*Continued.*)

SRADDHA (Ekoddishta)—*contd.*

4. *Widow.*
   a. Having no son.
   b. Mother of disqualified son.
5. *Daughter.*
   a. Maiden.
   b. Betrothed.
   c. Married.
6. Daughter's son.
7. Brother.
   a. Youngest uterine brother.
   b. Eldest uterine brother.
   c. Youngest stepbrother.
   d. Eldest stepbrother.
8. Brother's son.
   a. Son of youngest uterine brother.
   b. Son of eldest uterine brother.
   c. Son of youngest stepbrother.
   d. Son of eldest stepbrother.
9. Father.
10. *Mother.*
11. *Son's widow.*

SRADDHA (Ekoddishta)—*contd.*

12. *Son's daughter.*
13. Son's daughter, *married.*
14. *Grandson's widow.*
15. *Grandson's daughter.*
16. *Grandson's daughter, married.*[1]
17. Grandfather.
18. *Grandmother.*
19. Sapindas *ex parte paterna.*
    Uncles and others.
20. Samanodakas *ex parte paterna.*
21. Sagotras (or kinsmen of the same family name).
22. Maternal grandfather.
23. *Maternal grandmother?*[2]
24. Maternal uncle.
25. Sister's son.

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[1] According to Raghunandana, the great grandson's widow is also competent to perform the exequial rites. It should be mentioned, however, that she has been omitted in the summary appended to the Suddhitattva. See Raghunandana, pp. 491, 494.

[2] Bhavadeva.

LECTURE XV.

BENGAL SCHOOL.—(*Continued.*)

SRADDHA (Ekoddishta)—*contd.*

26. Sapindas *ex parte materna.*
27. Samanodakas *ex parte materna.*
28. *Widow belonging to a dissimilar caste.*
29. *An unmarried woman living as wife.*
30. *Father-in-law.*
31. *Son-in-law.*
32. *Grandmother's brother.*
33. Strangers.
    - *a.* Pupil.
    - *b.* Priest.
    - *c.* Spiritual preceptor.
    - *d.* Friend.
    - *e.* Father's friend.
    - *f.* Servants of the caste living in the same village.

INHERITANCE.

1. Son.
2. Grandson.
3. Great grandson.
4. *Widow.*
5. *Daughter.*
    - *a.* Unmarried.
    - *b.* Having or likely to have male issue.

INHERITANCE—*contd.*

6. Daughter's son.
7. Father.
8. *Mother.*
9. Brother.
    - *a.* Whole brother.
        1. Associated.
        2. Unassociated.
    - *b.* Halfbrother.
        1. Associated.
        2. Unassociated.

    An associated halfbrother inherits with unassociated whole brother.
10. Brother's son.
    1. Of whole blood.
    2. Of half „ &c.
11. Brother's grandson.
12. Sister's son.
13. Grandfather & great grandfather, with their lineal descendants including daughter's son.
14. Maternal kindred.
    - *a.* Grandfather.
    - *b.* Uncle, &c.
15. Sakulyas (or distant kinsmen).
16. Samanodakas (or remote kindred).

BENGAL SCHOOL—(*Concluded.*)

INHERITANCE—*contd.*

17. Strangers.
   - *a.* Spiritual preceptor.
   - *b.* Pupil.
   - *c.* Fellow-student.
   - *d.* Sagotra (*or persons bearing the same family name*) inhabiting the same village.

INHERITANCE—*contd.*

   - *e.* Persons descended from the same patriarch, and living in the same village.
   - *f.* Priests.
   - *g.* KING.

Illustrated by example.

Let us see now whether all the heirs mentioned by the Mitakshara are entitled to inheritance by the doctrine of religious offerings.

The son, the grandson, and the great grandson present parvana cakes, and are, therefore, entitled to succeed in preference to other kinsmen.

Points of agreement and difference between the Bengal and Benare Schools noted *en-passant.*

The widow, the daughter, the parents, the brother and his descendants, and the sapindas *ex parte paterna* can be brought in as heirs, without any difficulty whatever, by the doctrine of religious efficacy. The two schools of the Mitakshara and the Dayabhaga coincide in their enumeration of the *agnate* sapindas. There is a material difference between them, however, with regard to the order of succession of the cognate sapindas. According to the Dayabhaga, the cognate sapindas should inherit *immediately after* the agnate sapindas of the same line; while the Mitakshara postpones *all* the cognates to the agnates. The reason why the author of the Mitakshara does so, is *not* the reason of affinity, but the reason of religious efficacy. We

LECTURE XV.

will explain our meaning. The oblations given by the agnate kinsmen are, according to the Mitakshara, of superior efficacy to the offerings presented by cognate kinsmen; and, inasmuch as the cakes presented by cognate kinsmen are *secondary*, whenever there is a competition between agnate and cognate kinsmen, the latter must yield their claim in favor of the former. It is by having recourse to the simple s'ráddha canon, that "the oblations presented to the maternal grandfather and the rest are *secondary*,"[1] that the agnates are preferred to the cognates.

Daughter's son; his case exceptional.

The case of the daughter's son is exceptional. It should not be objected, says Jagannatha, that the son of the late proprietor's daughter's son could have, on this supposition, no title if any agnate kinsman were living. The Mahabharata shows that a daughter's son procures advantage even by his birth alone, and thus confers important benefits.[2] There can be no question, therefore, that the right of the daughter's son to succeed immediately after his mother is in every respect exceptional.

Priority of mother's claim over that of father accounted for: 1. Philologically.

The mother precedes the father in the table of succession on three separate grounds—philological, sentimental, and physiological. The first is the most important ground, according to the Mitakshara. The unilateral compound *pitarau* (parents), in Yajnavalkya's text,[3] yields, when analyzed by the canons of Panini, the word *mother* first, and then

[1] Colebrooke's Digest, Vol. II, 567. [2] *Ibid.* [3] II, 138.

the word *father*. On this philological ground, therefore, the mother takes precedence of the father. Lecture XV.

2. Sentimentally.

To strengthen his position he subjoins the sentimental reason. This is the second best ground on which the mother is preferred to the father: "The father is a common parent to other sons."[1] The affection of the father is divided when he has other sons by other wives. The mother's affection is centered on her son alone. The affection she bears to her son, therefore, should have its due reward.

3. Physiologically.

The third reason, what may be termed the physiological ground, is evidently the least important with the Mitakshara. Had it not been so, it would have been mentioned as the *first* ground. The reason of propinquity is not mentioned independently by itself. It is joined with the emotional reason. *Affinity* was not evidently uppermost at the time in the mind of the author of the Mitakshara. It is the strength of the mother's affection which should determine the preference question. It is her affection which makes her nearer and dearer to her son. The ground of propinquity, however, is only an unimportant consideration. It is the philological ground which decided the contest in favor of the mother.

Not on religious ground.

The reason why, in the case of the mother, the author of the Mitakshara was driven to have recourse to other than religious considerations was,

[1] Mitakshara, II, 3, 3.

LECTURE XV.

that he found that the *mother*, in consequence of being a female, was incapable of performing religious rites which would benefit her son. When the father is alive, it is he who should perform all ceremonies which would conduce to the spiritual welfare of the son. It is the mother's affection which entitles her to have the first place in the table of inheritance; and she must have it. She cannot do so on religious grounds; she should have it then on the best of all grounds—the love she bears to her son. That the author of the Mitakshara did not lay much stress on the physiological ground can be very well explained. Had he done so, he would have had the worst of the argument. He wisely refrained from pressing the physiological ground as his principal reason, bearing in mind the dictum of father Manu that, "in a comparison of the male with the female sex, the male is pronounced superior."[1]

The author of the Dayabhaga also felt considerable difficulty in bringing in the mother and other females as heirs on religious grounds. He extricates himself from this difficulty by saying that the right of succession accrues to them 'under express texts.'[2]

Bandhus take their place as heirs after the agnates are exhausted (Mitakshara).

After the agnates are exhausted, the bandhus, according to the Mitakshara, are entitled to inheritance. Of these those that are competent to present the parvana cakes, do of course get the prece-

[1] Manu, IX, 35; Dayabhaga, XI, 3, 3.
[2] Dayabhaga, XI, 6, 11.

Lecture XV.

dence in the table of inheritance. After the kinsmen who give the *parvana* offerings have been exhausted, the other bandhus who are capable of offering other descriptions of pindas come in as heirs. For, says Jagannatha, "any benefit whatsoever is a sufficient foundation of a title to inherit."[1] The owner's father's and mother's bandhus are in this way recognized as heirs.

Father's cognate kindred on his mother's side; their rights founded not only on affinity.

It is said, however, that "the sons of the father's maternal aunt, and of the father's maternal uncle, that is, the father's cognate kindred on his mother's side, are only connected with the owner through his paternal grandmother. Now neither of these persons presents offerings to any one to whom the owner presents them. Consequently their offerings are neither shared in by the owner, nor do they operate in discharge of any duty which he is bound to perform. Similarly, the sons of the mother's maternal uncle and aunt,—that is, the mother's cognate kindred, on *her* mother's side,—are only connected with the owner through his maternal grandmother. The same observation as before applies to them. Here again there is no conceivable community of religious benefit."[2]

The case of father's and mother's *bandhus*, we often hear it said, is conclusive evidence of the Mitakshara law being based upon *affinity* only, and not upon religious *merit*. Those who say so forget

[1] Colebrooke's Digest, Vol. II, 544. [2] Mayne's Hindu Law, 437.

that the benefits conferred through the offering of the funeral cake in the *parvana* do not constitute the *sole* ground on which rests the right of succession to the property left by a man, but that any benefit whatsoever is sufficient foundation of a title to inherit. We at once admit that the father's and the mother's bandhus "could not possibly be brought within any system which depends upon religious merit" accruing from *parvana* rites only. But they could surely be brought within a system which distinctly lays it down that "any benefit whatsoever is a sufficient foundation of a title to inherit."

But also on their competency to perform s'ráddha rites.

The bandhus of the father and mother can never come in as heirs, so long as there is a single person who is competent to perform the parvana rites. But, in absence of them, the mere fact of their being entitled to celebrate the *s'ráddha* of their deceased kinsmen "is a sufficient foundation of their title to inherit."

Now look at the tables given, and see whether the father's and mother's *bandhus* are privileged to celebrate those religious rites, the reward of performing which is the wealth of the deceased. You see them here immediately after the owner's bandhus,—*i.e.*, his first cousins. The figures 19 and 20 in the annexed table mark their places. In the *S'ráddha* table, the bandhus, with the only exceptions of the daughter's son, and the sister's son, follow the samanodakas and sagotras; in the Inheritance

table, the same order is preserved. What stronger argument than this can there be to show that the doctrine of religious benefits must have regulated the Mitakshara order of succession ?

Lecture XV.

The statement that, under the Mitakshara law, "persons who confer high religious benefits are postponed to persons who confer hardly any ; and persons who confer none whatever are admitted as heirs, for no other reason than that of affinity" will be thus seen to have been entirely groundless.

Sacrificial offering a mere evidence of right.

We quite agree, however, with Mr. Mayne that "a man did not inherit because he performed funeral rites, or made religious offerings. He inherited because he was the nearest of kin to the deceased, and he made religious offerings for exactly the same reason. In the majority of cases the heir to the estate would also be a person who was bound to offer the funeral cake. The offering of sacrifices to the deceased was really a duty. It grew to be considered the evidence of a right."[1]

Intimate connection between the inheritor of property and the performer of sacrifices.

The nearest of kin offered the exequial oblations, and the nearest of kin were entitled to the inheritance. "Sages declare partition of inheritable property," says Devala, "to be co-ordinate with the gift of funeral cakes."[2] The succession to the estate and the performance of religious rites in honor of the deceased were thus inseparably connected

[1] Mayne's Hindu Law, 438, 439. [2] Colebrooke's Digest, Vol. II, 243.

LECTURE XV.

together. There thus being an intimate connection between the two classes of persons,—those who inherited the property and those who offered sacrifices to the deceased,—what was more natural than to declare, that if the least difficulty was experienced in finding out an heir, apply the religious test, and the heir will be found out at once? Apply either the test of affinity, or the test of religious merit, the result will be the same. The religious rites can never be performed by any other than the nearest kindred; and, in a similar manner, the inheritance can never devolve on any other than the nearest of kin. The two propositions being thus co-extensive in the majority of cases, the religious test was most useful in determining the preferable right of an heir. The nearest of kin was entitled, by universal consent, to the property of the deceased; but when there were many claimants to the heritage, each urging his title as the *nearest* of kin, it was necessary to apply the religious test to discriminate between their rights.[1] The doctrine of community of blood-corpuscles did not always yield satisfactory results. Suppose there are *three* claimants to the property of the deceased: the deceased's brother's grandson, his paternal uncle's son, and his grand uncle. Each of these claimants is *four* degrees removed from the deceased owner. Each of them may very well say that the blood-corpuscles in his

Preference of right determined by the sacrificial test.

[1] Viramitrodaya, II, 1, 23a.

veins are equal in every respect to those of another claimant. Here an advocate of the doctrine of affinity would be in a dilemma. If he is a staunch advocate of the principle of consanguinity, he would, without the least hesitation, divide the property *equally* among these four claimants. He would at once give it as his opinion that the property should be equally distributed amongst the relations of the deceased standing at an equal distance from him. This is exactly what *Nilakantha*, the founder of the *Maharashtra* School, has done. He says: "The paternal grandfather and the halfbrother take in equal shares, because their propinquity is equal. In other cases too, where propinquity is equal, the same rule holds. Therefore, in default of the paternal grandfather and a halfbrother, the succession should devolve *equally* on the paternal great grandfather, the father's brother, and the sons of the halfbrother."[1] "But this rule of equal distribution," says Mr. Justice West, "appears to have been wholly disregarded in practice. No claim by co-heirs, as far as our experience goes, has ever been based upon it. Nilakantha's speculative suggestion has not, then, by its accordance with, or adoption into, the customary law, become a binding rule."[2] The difficulty experienced by Nilakantha was a real difficulty; and the logical result of the doctrine of affinity would be exactly what the author of the

[1] Vyavahara Mayukha, IV, 8, 20.

[2] I. L. R., 2 Bomb., 447.

LECTURE XV.

Mayukha has declared it to be. If you follow the doctrine of affinity, you must not hesitate to carry out the doctrine to its most legitimate consequences. If you are not prepared to accept the doctrine in this form, you have no other course left but to combine the religious principle with it and to frame your order of succession by their joint aid. This is what has been done by the author of the Mitakshara and the Dayabhaga.

Affinity—the sole basis of inheritance in Bengal and Benares Schools.

The real fact of the matter is, the system of inheritance in both the schools is based on affinity only. It cannot be otherwise. The principle of affinity is the natural principle. A system of inheritance based upon any other principle would be unnatural and utterly worthless. Had the system of inheritance in these schools been based on any other principle, it would not have been accepted by the good sense of the people governed by the law. It is nowhere declared that he who performs the obsequies is *necessarily* an heir. It has nowhere been declared, I mean, that the mere act of celebrating the funeral rites gives a title to the succession. The rule of propinquity is the governing principle in succession, not only in the Mitakshara School, but also, we are bold to affirm, in the Dayabhaga School. It was simply to vindicate the great claim of propinquity that the author of the Dayabhaga laid so much stress on the proper application of the doctrine of reli-

gious benefits. It was simply to give their proper places to the cognate kinsmen that he elaborated the theory of spiritual benefits. As regards the doctrine of affinity, therefore, there cannot be any difference of opinion. The system of inheritance is grounded in both the schools on the principle of affinity, and on affinity only. The religious test was also applied in both the schools to discriminate between the rival claims of contending heirs. The real point of difference was in this : The author of the Mitakshara was evidently of opinion that as the oblations presented by cognate kinsmen are 'secondary,' the cognate kinsmen should, as a body, be postponed to the agnates. The Dayabhaga admitted that these oblations were 'secondary;' but said the author, the oblations given by the cognate kinsmen were *parvana pindas* nevertheless, and as such they should have their due weight. The benefit conferred upon the deceased was undoubted. The mere question was, whether the oblations offered by the agnates should outweigh the value of the offerings made by cognate kinsmen. The author of the Mitakshara thought that the latter description of *pindas* were of a very inferior character, and can, on no account, bear any comparison, as far as their spiritual merit is concerned, with the oblations presented by agnate kinsmen. The offerings made by the cognate kinsmen were admitted to be 'secondary' by

Religious test applicable to both schools in settling rival claims.

LECTURE XV.

Jimutavahana, but he demurred to the proposition that they were utterly worthless, and should be entirely ignored. He was of opinion that the cognates who gave the *parvana pindas* should merely be excluded by the *agnates* of the *same line.* In absence of agnates, the cognates of the *same line* are entitled to succeed; and should, on no account, be excluded by the agnates of a remoter line.

Difference between the two schools consists in the interpretation of a religious *dictum* anent the comparative efficacy of oblations offered by the agnate and cognate kinsmen.

We thus see that, both in the Mitakshara and the Dayabhaga, affinity created the heritable right, and religious merit determined the preferable right. The points of difference in both the schools depended upon the difference in the interpretation of a religious dogma relating to the efficacy of oblations presented by agnate and cognate kinsmen. Both Vijnanesvara and Jimutavahana based their systems of inheritance on the only solid foundation upon which the sages of all ages and countries have based the rules of succession. The principle of affinity and propinquity is the only true principle which governs the law of succession. The religious principle simply indicated the direction in which the doctrine of affinity is to be applied. Affinity was the basis of the right of succession, and religious merit was simply held to be an index of propinquity in regulating the *order* of succession. The different interpretations given to the religious principle in different schools must, of course, be accepted, and the administrators of the law of inheritance

LECTURE XV.

should be guided in their decisions by the rules of interpretation peculiar to each school. But it should never be forgotten that "the Hindu law contains in itself the principles of its own exposition,"[1] which must, in every case, be followed to arrive at a true decision in a disputed question. If it be found that the written text of the law is entirely opposed to a particular usage—if it be shown that a particular custom existed from time immemorial—it will certainly outweigh the written text of law.[2] It is entirely opposed to the spirit of the Hindu race to allow the words of the law to control its long-received interpretation.[3] "The duty of a European Judge in administering Hindu law," says the Privy Council, "is to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, and to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage."[4] We have shown that the doctrine of religious efficacy in determining the heritable right has been accepted and applied in practice by eminent writers of the Benares School, and emphatically so by the author of the Viramitrodaya,[5] which has been declared by the highest judicial authority to be "properly receivable as an exposi-

Doctrine of religious efficacy accepted by the lawyers of the Benares School.

Viramitrodaya: authority of its exposition on doubtful points.

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[1] 2 Suth. P. C. Rul., 332.
[2] 23 Weekly Reporter, P. C., 131.
[3] 2 Suth. P. C. Rul., 474.
[4] *Ibid*, 135.
[5] Viramitrodaya, II, 1, 23 ; III, 1, 11.

LECTURE XV. tion of what may have been left doubtful by the Mitakshara and is declaratory of the law of the Benares School."[1] It will thus be seen that, in interpreting the rules of succession, it is quite justifiable to apply the doctrine of religious merit in the Mitakshara School, and the principle of affinity in the Dayabhaga School, in determining a preferable heir.

[1] 10 Weekly Reporter, P. C., 31.

LECTURE XVI.

LAW OF SUCCESSION IN A DIVIDED FAMILY.

Law of Succession in a divided family — Son, grandson, and great grandson — Right of representation extends to the grandson — Primogeniture — *Neelkisto Deb* v. *Beerchunder Thakoor* — Sons separated excluded by those not separated — In the Mitakshara School, son's right in the ancestral real property runs *pari passu* with the father's — Diversity of opinion as to his rights in ancestral personal property as well as in the self-acquired estate of his father — Accrual of right by birth — Law of the Dayabhaga distinguished from that of the Mitakshara — According to the former the son has no interest in the ancestral property as long as his father lives — Opinion of the late Sudder Court quoted — The existence of a son does not affect the father's absolute right over a property, whether inherited or self-acquired — Law laid down by the Privy Council as to a successor being "the heir of the last full owner" — Right of male heirs absolute, that of female heirs qualified — Succession not traced from female heirs, they not being full owners — Doctrine of non-abeyance — When does abeyance take place and to what extent? — Law as to devolution when the succession vests in a female — Illustrated in the case of sister's sons born either before or after the maternal uncle's death, and in that of a grandson born after the death of his maternal uncle but during his grandfather's lifetime — Widow: her legal rights — Life-interest — Power of alienation limited, and exercisable under certain necessities — Widow's inheritance does not constitute her stridhan or *peculium* — On her death the inheritance passes to her husband's heir living at the time — Widow's rights according to Dayabhaga — Defined by the Privy Council — Residence with her deceased husband's relations not compulsory — Absolute possession, and restricted power of alienation of the property left by him — Whether real or personal — Mithila Law — Absolute dominion over moveable property, which can be alienated by the widow at her pleasure — Her interest in the landed property is limited — Chastity a condition precedent to widow's right to inherit — Does incontinence on the part of the widow after inheriting an estate entail forfeiture of the same? — Question answered in the negative by the Calcutta High Court — The decision upheld by the Privy Council, whose judgment is quoted at length — Unchastity disqualifies all female heirs from succession — Yajnavalkya and his great commentator quoted in proof of the existence of the positive rule that incontinence in a woman deprives her of her legal rights — Daughters; their classification — In all the schools of Hindu law the unmarried daughters supersede the married — In Bengal, daughters of a certain description excluded

LECTURE XVI.

from inheritance — Property inherited by an unmarried daughter devolves at her death on her issue, to the exclusion of her married sister and their male issue — The rule is not of exceptional character — In Bombay, a daughter's inheritance is looked upon as her stridhan — Under the Mitakshara law, property inherited by an unmarried daughter passes to her sister, although the former leaves a son surviving her — In the Benares School, the disputed claim between the married daughters is settled by the criterion of relative poverty — No such rule in the Mithila School — Law of the Dravira School — Barren daughters disinherited — Daughter's interest extends for life only — She is her father's heir, but not her mother's — Her legal position not better than that of the widow — Non-cesser of the vested right — Survivorship — Daughter's son — '*Per capita*' rule — Recognition as heir by Mithila law — Parents — Brothers — Precedence determined by the criteria of whole blood and association — Srikrishna's summary of the rule — Full Bench Ruling of the Calcutta High Court — Sisters recognized as heirs in Bombay — Nephews — Precedence determined by the rule of blood with reference to the fathers and by that of union with reference to themselves — They take *per capita* — Mitakshara on the right of a brother's son, his father having predeceased his uncles — Brother's grandson — Strangers — Law as to escheat laid down by the Privy Council — Legal heirs failing, the Crown takes the property subject to trusts, &c., if any — Heirs to property left by ascetics — "Associate in holiness" — Interpretation of the phrase by the Calcutta High Court — One living in fellowship and personal association — Bairagis not divested of civil rights as such — Succession to their property regulated by ordinary rules — Illegitimate sons, their rights — Maintenance when they belong to the three regenerate castes — Mitakshara on their rights to succession when they belong to the Sudra caste — Expounded by the Bombay High Court — Son of a concubine considered as the son of a female slave — Allahabad High Court's view of the same — Bengal High Court lays down no sweeping rule — Certain descriptions of illegitimate sons entitled to inherit in the absence of legitimate issue — The Dayabhaga law on the point is based on Manu's text — Kulluka Bhatta's commentary thereon — Jagannath Bhatta — Dattaka Mimansa's explanation of the term '*dási*' — Distinction between a concubine and a female slave — Among the Sudras the only illegitimate sons entitled to inherit are those born of a female slave, or of a slave's female slave — Their status affected by Act V of 1843 — Shares of the illegitimate children when they are entitled to inherit — They cannot succeed to the property left by their putative father's collaterals — The reason of this rule is not obvious — Illegitimate son of one of the mixed classses — Status of children begotten by an Englishman on a Brahmin woman — *Maina Bai* v. *Uttaram* — Reunion, its legal import — Between what persons it can be effected — Order of succession among reunited coparceners according to the Mitakshara — Different from that laid down in the Viramitrodaya — Rule applicable to all the schools of law — Exclusion from inheritance — Blindness — Lameness, &c. — Insanity,

idiocy — Incurable disease — Elephantiasis, &c. — Loss of caste — Disqualified females excluded — Legitimate issue, if free from disqualifications, inherit — But not adopted sons — An after-born son — Removal of disqualifying defects — Custom.

LECTURE XVI.

Law of Succession in a divided family.

LET us now trace the course of succession in a divided family, and determine the nature of the interest of each class of heirs under the Hindu Law of Succession.

Son, grandson, and great grandson.

The son, the grandson, and the great grandson successively inherit the property of the deceased. The son excludes the son's son, and the grandson excludes the great grandson. Sons share equally *per capita*: but those who, like grandsons, take *jure representationis*, inherit *per stirpes*,—*i.e.*, they take that share only which he whom they represent would have taken had he been alive. The right of representation is admitted as far as the great grandson; so that a grandson whose father is dead, and a great grandson whose father and grandfather are dead, participate equally in the inheritance with the son. But, during the lifetime of their parents, neither the grandson, nor the great grandson, is entitled to the inheritance. They are excluded by their father and grandfather.

Right of representation extends to the grandson.

Primogeniture.

PRIMOGENITURE.—The rule of equal division is not the universal rule. The rule of primogeniture is still applicable in some cases.

Where a subject of inheritance is, from its nature, *indivisible*, it can descend to one only of several sons. In such cases the general rule is, that the eldest

111

LECTURE XVI.

son takes the heritage. The rule of primogeniture governs only the succession to extensive zemindaries or principalities denominated 'raj.'[1] Here long-established *kulachara*, or family usage, has the force of law, and conveys the property to the eldest son. But the custom of impartibility must be strictly proved in order to control the operation of the ordinary Hindu law of succession.[2]

Where the property is impartible, and can, therefore, descend to one only of several sons, the succession as between sons by different wives is to be determined by priority of birth of the sons, and not by the priority of marriage of their respective mothers.[3]

As regards the question of the extent to which property of the nature of an impartible *raj* is excepted from the general law by a special rule of succession entitling the eldest of the next-of-kin to take solely, it should be distinctly understood that such a usage does not interfere with the general rules of succession farther than to vest the possession and enjoyment of the *corpus* of the whole estate in a single member of the family. On the death of the last holder, his successor is to be sought among his *next-of-kin*. The eldest among these will get the

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[1] See Reg. XI, 1793.

[2] Thakur Durriayo Singh *v.* Thakur Duri Singh, 13 B. L. R., P. C., 165.

[3] Ragoonath *v.* Hurrihur, 7 S. D. Rep., 146 ; Rama Lakhsmi Ammal *v.* Siva Nantha Perumal, 12 B. L. R., P. C., 396 ; Pedda Ramappa *v.* Bangari Seshamma, P. C., 5 I. J., 99.

estate. The rule of Manu—"Whoever is nearest to the deceased sapinda, to him his property shall belong"[1]—is universally applicable. In determining the next heir to an impartible estate, then, we are, first of all, to find out the *nearest* kinsmen of the deceased holder. The preference among these will be determined by seniority in age. 'Nearness of kin' and 'seniority in age' will, in all cases of disputed succession, determine the preferential right of a claimant. The nearest and eldest male kinsman is always the rightful heir. Suppose the last holder has died leaving sons, the *eldest* among these is his heir. Suppose the eldest son died during the lifetime of his father, leaving younger brothers and also sons. As sons were nearer to the last holder than his grandsons, the eldest of the surviving sons is entitled to the estate. The rule 'by representation' is of no force here. Suppose again the last holder died leaving brothers of the whole blood, and brothers of the halfblood. The brothers of the whole blood are of course 'nearer of kin' than brothers of the half-blood. The latter, consequently, are excluded. Among the former again, the eldest of the surviving brothers would be entitled to the succession. In the case of *Neelkisto Deb* v. *Beerchunder Thakoor*, known as the Tipperah case, the question was—Whether a younger uterine brother, or an elder step-brother, was

LECTURE XVI.

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[1] Manu, IX, 187.

LECTURE XVI.

Neelkisto Deb v. Beerchunder Thakoor.

entitled to the succession. The Privy Council, in delivering judgment in this important case, said:—

"The normal state of every Hindu family is joint. Presumably, every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things The family in which title to a kingdom exists in one member follows this general law; but it follows it in part only, for the succession to a kingdom is an exception to it from the very nature of the thing: the family may have property distinct from that to which a sole heirship belongs, and may continue joint. Still when a raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title. Survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights of others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heir-

ship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir. In the *Shivagunga case*,[1] it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindu law two leading rules of inheritance, that founded on the religious duty and superior efficacy of oblation and sacrifice, and that by survivorship. Where the latter rule cannot apply, the former must be resorted to. Now, this rule of religious obligation and priority marks the brother of the whole blood as preferable heir in succession to the estate of his brother over the brother of the halfblood only. The reason given is, that he offers more sacrifices, and benefits more the manes of the dead of his family; in their eyes a real substantial ground of preference. In nature, also, he is nearer, and therefore satisfies the description 'nearer of kin.' Since, then, the custom in this family requires the union of two things to constitute the legal heir,—*viz.*, seniority in age and nearness of kin (which in truth is in conformity with the general law of royal descent), and the claimant has but one of these qualifications in himself,—*viz.*, seniority; he does not entitle himself by the family custom. There is no trustworthy evidence that the custom supersedes the general rule as to the precedence of the whole over

[1] 1 Sutherland's P. C. R., 520.

LECTURE XVI.

the half blood. The custom is silent on that point. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. On general principles, therefore, the Hindu law must be resorted to in this case; for unless where survivorship furnishes an exception, the whole blood is preferred."[1]

Sons separated excluded by those not separated.

Sons legally separated from their father have not, on his death, any claim to inherit his property with a son not separated. Thus, where a father separates from his sons, *an after-born son* alone inherits the share which his father took on partition, as well as any wealth acquired by the father subsequent to partition.[2] The text of Vrihaspati—"A son born before partition has no claim on the wealth of his parents; nor one begotten after it, on that of his brother"—must not be understood as declaring, that separated sons would, under no circumstances, take by inheritance the separated share of the father, any more than as declaring that the son begotten after partition could, under no circumstances, claim succession to his brother who had separated before his birth. The text declares no more than the relative rights of the sons born before and after partition where both classes exist.[3]

In the Mitakshara School son's right

That, under the law of the Mitakshara, each son upon his birth takes a share equal to that of his

[1] 2 Sutherland's P. C. R., 246.
[2] 11 W. R., F. B., 11.
[3] Ramappa Naicken *v.* Sithammal, I. L. R., 2 Mad., 182.

father in *ancestral* immoveable estate is indisputable. Upon the questions whether he has the same right in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. It has been decided by the highest judicial authority that the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren.[1] It is beyond our province, however, to inquire, in this place, into the status, rights, liabilities, and privileges of all the members of a joint and undivided family; and we leave it to future inquirers to determine this important question. It is enough for our purpose to say that, according to the Mitakshara, "grandsons have by birth a right in the grandfather's estate equally with sons."[2]

LECTURE XVI.

in the ancestral real property runs *pari passu* with the father's.

Diversity of opinion as to his rights in ancestral personal property as well as in the self-acquired estate of his father.

Accrual of right by birth.

In the Dayabhaga School, a person has absolute control over the property inherited by him. His sons have nothing whatever to do with the estate which is vested absolutely in the father. The Mitakshara law is different in this respect from the Dayabhaga law. Proprietary right is created by birth, according to the Mitakshara;[3] and it is solely

Law of the Dayabhaga distinguished from that of the Mitakshara.

[1] Suraj Bunsi Koer v. Sheo Pershad Singh, I. L. R., 5 Calc., 164.
[2] Mitakshara, II.
[3] Mitakshara, I, 1, 2-3; 5. 2, 10.

LECTURE XVI.

According to the former the son has no interest in the ancestral property as long as his father lives.

in right of benefits conferred, according to the Dayabhaga. Inasmuch as a son is not competent to perform the *sráddha* of his grandfather, &c., during the lifetime of his father, he cannot claim any interest in the ancestral property equally with his father.[1]

In the case of *Juggomohun Roy* v. *Srimati Neemoo Dossee*, a letter was addressed, in 1831, by the Judges of the old Supreme Court to the Judges of the Sudder Dewanny Adawlut, requesting an answer to the following question,—

" Whether, according to the doctrines of the Sudder Dewanny Adawlut, a Hindu who has sons can sell, or give, or pledge, without their consent, immoveable ancestral property situated in the province of Bengal."

To this the following reply was given by the learned Judges of the Sudder Court,—

Opinion of the late Sudder Court quoted.

" On mature consideration of the points referred to us, we are unanimously of opinion, that the only doctrine that can be held by the Sudder Dewanny Adawlut consistently with the decisions of the Court, and with the customs and usages of the people, is, that a Hindu, who has sons, *can* sell, give, or pledge, without their consent, immoveable ancestral property situate in the province of Bengal."

Chief Justice Grey, in delivering judgment, said :—

" The district of Benares being situated far in-

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[1] Dayabhaga, I, 15-20 ; II, 9-20.

land, is more agricultural than Bengal, in which is the conflux of all the great rivers with the sea, and where, consequently, the pursuits of the more wealthy part of the population are of a mercantile character; consequently, there are many important differences between the doctrines of the Benares and the Bengal Schools, the latter generally favoring alienations of property, and thereby facilitating mercantile speculations. The Mitakshara of Vijnanesvara is received throughout the whole range, from Benares to the southernmost extremity of the peninsula, and this does not allow the share of a coparcener to be sold without the consent of the other coparceners. The doctrine which prevails in Bengal is opposed to this."

Ryan, J., declined entering into the subject as a question of Hindu law, because he considered, that, as the Supreme Court had in numerous decisions from its earliest establishment uniformly held, that a father could dispose of ancestral property, the point of law must be taken as settled, and that it would be most mischievous to overturn a long established practice, which had now become the foundation of titles to a great part of the property throughout Calcutta.[1]

The existence of a son does not affect the father's absolute right over

This case touches upon many curious points. I have, therefore, referred to it at length. It will show that fifty years ago British jurists were not quite

[1] Clarke's Notes of Decided Cases, p. 10.

LECTURE XVI.

a property whether inherited or self-acquired.

certain whether, according to the Dayabhaga, a son was a co-proprietor, as in the Mitakshara, with his father in his ancestral property. It seems to be strange that the texts of the Dayabhaga on this subject could ever admit of a doubt. But that grave doubts were entertained is evident from the judgments referred to above. It is settled now in Bengal that a person has absolute dominion over his ancestral or acquired property, and that he can alienate in any way he likes the whole or any portion of it without the consent of his sons, or any other heirs.

Law laid down by the Privy Council as to a successor being "the heir of the last full owner."

The rule of Hindu law is, says the Privy Council, that, in the case of inheritance, the person to succeed must be the heir of the last full owner. On the death of the last full owner, his wife succeeds as his heir to a widow's estate ; and on her death, the person to succeed is the heir at that time of the last full owner.[1] The case in which this dictum was laid down by the Privy Council was governed by the Dayabhaga law. But the principle asserted is as applicable to the Mitakshara School as it is to that of the Dayabhaga. The right of succession must, *in all cases*, be traced from the last full owner.

Right of male heirs absolute, that of female heirs qualified.

Male heirs take the heritage absolutely; but female heirs take only restricted estates. If a title is once vested in a male heir, it cannot be lost again except by his own act. A male heir, then, who receives the inheritance becomes a fresh stock of

[1] Bhubun Mayi Debi *v.* Ramkishore Acharjee, 1 Suth. P. C. R., 574.

descent, and a new departure is taken on his death. The line of representation starts afresh from him. He is the last full owner, and all those who proceed from him, or claim the heritable right through him, are entitled to succeed to him. According to the table of succession we have given in another place, the great grandson inherits on failure of nearer male issue. His son cannot claim the right of inheritance in presence of other preferable heirs. But should the great grandson inherit the estate, and then die, *his heirs*, and not those of the original proprietor from whom he himself derived his title, receive the inheritance from him. It does not revert to those persons who would have been the heirs of the original proprietor had not the great grandson been in existence. Had not the great grandson succeeded his great grandfather, then the daughter of the original owner would have been entitled to the right of succession. As it is, however, the issue of the great grandson now receive the estate.

Should the inheritance, similarly, devolve on a brother's son in default of nearer kinsmen, it would descend to the new inheritor's heirs, and would not go to the paternal grandmother (or the grandfather) of the original proprietor, who would ordinarily have taken the heritage had not the nephew intervened. The right of inheritance in this way is always traced from the *last* owner.

Succession not traced

It is not quite correct to say that the devolution

LECTURE XVI.

from female heirs, they not being full owners.

of the property is traced from the *last holder*. I will explain my meaning. Females, I have told you, take restricted estates as a rule. The widow, the daughter, the mother, the grandmother, and all the other female heirs receive only what are called life-estates. As they are holders of only qualified estates, the right of succession cannot be traced from them. They do not become fresh stocks of descent. They are not full owners, and fresh lines of representation, therefore, cannot start from them. On their death, the property descends not to *their* heirs, but to the heirs of the last male proprietor, who was the last full owner.

Doctrine of non-abeyance.

An inheritance can never remain in abeyance for an unbegotten heir (such not being a posthumous son). The succession must vest in the heirs existing at the time when the succession opens out.[1] Thus, a nephew, born after the death of his uncle, cannot take as heir to his uncle.[2]

When does abeyance take place, and to what extent?

A child in the womb takes no estate. In cases where, when the succession opens out, a female member of the family has conceived, the inheritance remains in abeyance until the result of the conception can be ascertained. If the child be still-born, the estate goes to the heir of the last full owner.[3]

Law as to devolution

You should remember that, on the death of the

[1] Koylas Nath Dass *v*. Gyan Monee Dossee, Sp. W. R., 314.

[2] Sev., 248.

[3] Musst. Goura Choudharain *v*. Churomon Choudhry, Sp. W. R., 223, 340; Sev., 238.

Lecture XVI.

last full owner, the succession vests at once in the next legal heir. Now suppose the next heir, in whom the property is vested, is a female heir; she possesses only a restricted estate—Where should the property go on her death? It will go of course to the heirs of the last full owner from whom she inherited. But suppose it so happens that certain reversionary heirs of the last full owner, who were alive when the last full owner died, have since died, leaving issue. Should the heritage in question which was last held by a female heir go now to the issue of the reversionary heirs existing at the time of the death of the person whose inheritance descends, or should it be taken by the heirs who were existing at the time of the death of the last female holder? In other words, should the succession vest in the heirs existing when the succession first opens out, on the death of the person whose inheritance descends, or should it vest in those existing when the succession last opens out? This question has been answered by the Privy Council in the judgment referred to before.[1]

when the succession vests in a female.

It is an accepted rule in the Bengal School that the right of succession accrues to sister's sons, whether born before or after the death of their maternal uncle, not on the death of the maternal uncle, but on the death of his widow.[2]

Illustrated in the case of sister's sons born either before or after the maternal uncle's death,

A grandson born *after* the death of his maternal

and in that of a grandson born after the

[1] 1 Suth. P. C. R., 574. [2] Sp. W. R., 153.

LECTURE XVI.

death of his maternal uncle, but during his grandfather's lifetime.

uncle, but *during the lifetime* of his maternal grandmother, may inherit from her the property which she inherited from the uncle (her son).[1]

The Bengal High Court laid down the rule mentioned above. It is a rule sanctioned not only by the Dayabhaga, but is applicable also to the Mitakshara School of law.

Widow: her legal rights.

In default of male issue down to the *third* degree, counting from, but exclusive of, the deceased, the inheritance descends lineally no farther, and in a *divided* family, the widow inherits. According to the Mitakshara law, a widow cannot claim an undivided property.[2] If there be more than one widow, their rights are equal.

Life-interest.

A widow is entitled by law to a life-estate in her husband's property; and has no power to alienate it as against his collateral heirs.[3] It has been held by the Privy Council, that "under the Hindu law,"[4] a widow, though she takes as heir, takes a special and qualified estate. "It is admitted on all hands that if there be collateral heirs of the husband, the widow cannot, of her own will, alienate the property except for special purposes. For religious or charitable purposes, or those which are supposed to con-

Power of alienation limited

[1] 1 W. R., 123.

[2] Rewan Persad *v.* Musst. Radha Beeby, 1 Suth. P. C. R., 172.

[3] Keerut Singh *v.* Koolal Singh, 1 Suth., 96, 98; Ghirdharee Sing *v.* Koolahul Singh, *ib.*

[4] The Collector of Masulipatam *v.* Cavaly Vencata Narainapah, 1 Suth. P. C. R., 476.

duce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity.

Lecture XVI.

"On the other hand, it may be taken as established, that an alienation by her, which would not otherwise be legitimate, may become so, if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that, in absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favor of alienation with consent may be due to a presumption of law, that, where that consent is given, the purpose for which the alienation is made must be proper.

"The restrictions on the widow's power of alienation are inseparable from her estate, and independent of the existence of heirs capable of taking on her death. If for want of heirs, the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown has the same power of protecting its interest as an heir by impeaching any injurious alienation by the widow."

and exercisable under certain necessities.

The law of inheritance relating to women was declared in the case of a widow by two important decisions of the Privy Council. The first is *Musst. Thakoor Deyhee* v. *Rai Baluk Ram*, and the

LECTURE XVI.

other is *Bhugwandeen Dhoobey* v. *Myna Baee*.[1] After a very full consideration of the authorities, and in two elaborate judgments discussing at length those authorities, the Privy Council decided that, under the law of the Mitakshara, a widow's estate inherited from her husband is a limited and restricted estate only.

In the important case of *Mussamut Thakoor Deyhee* v. *Rai Baluk Ram and others*, the Judicial Committee of the Privy Council remarked : " The result of the authorities seems to be, that although, according to the law of the Western schools (Mitakshara, Mithila, and others), the widow *may have* a power of disposing of *moveable* property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as by the other, restricted from alienating any immoveable property which she has so inherited; and that, on her death, the immoveable property and moveable, if she has not otherwise disposed of it, pass to the next heir of her husband."

Widow's inheritance does not constitute her stridhan or *peculium*.

In the case of *Bhugwandeen Dhoobey* v. *Myna Baee*, it was held that, according to the Mitakshara law, no part of her husband's estate, whether moveable or immoveable, to which a Hindu widow succeeds by inheritance, forms part of her *stridhan* or peculiar property. " The reasons for the restrictions," remarks the Privy Council, " which the Hindu law imposes on the widow's dominion over her inheritance from her husband, whether founded on her

[1] 11 Moo. I. A., 139, 487.

natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income, as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the Benares Pandits is sufficient to show that the supposed distinction between moveable and immoveable property is anything but well established in that school. And the unanimous judgment of the five Judges of the Sudder Court, supported by the opinion of the Court Pandits, has, in this case, ruled, that the distinction does not exist. Such a judgment ought not to be lightly overruled.

" Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, no part of her husband's estate, whether moveable or immoveable, to which a Hindu woman succeeds by inheritance, forms part of her *stridhan* or peculiar property ; and that the text of Katyayana—' The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate or property until she die ; after her the legal heirs shall take it,' [1]—which is general in its terms, and of which

[1] 2 Colebrooke's Digest.

LECTURE XVI.

the authority is undoubted, must be taken to determine, *first*, that her power of disposition over both is limited to certain purposes ; and *secondly*, that on her death both pass to the next heir of her husband."[1]

In the case of *Musst. Thakoor Deyhee*, the question whether the widow had any power of disposing of moveable property inherited from her husband was not decided. The point evidently was still doubtful in February, 1867, when the judgment in this case was delivered. The question was set at rest in March, 1868, in the case of *Bhugwandeen Dhoobey*. A widow's estate in both moveable and immoveable property inherited from her husband is "a limited and restricted estate only."

On her death the inheritance passes to her husband's heir living at the time.

You will observe that, on the death of the widow, the property she possessed passes to the next heir of her husband. The right to succeed must be always traced from the last full owner. "The rule of Hindu law is," as I pointed out to you, "that, in the case of inheritance, the person to succeed must be the heir of the last full owner. On the death of the last full owner his wife succeeds as his heir to a widow's estate ; and, on her death, the person to succeed is the heir *at that time* of the last full owner."[2] It was held by the old Sudder Court in the case of *Luxmi Baiee* v. *Tulu Narrayan Singh*,[3] "that the reversionary heirs to an estate of a sonless Hindu (vacated by the widow's

[1] Bhugwandeen Dhoobey *v.* Myna Baee, 2 Suth. P. C. R., 133.
[2] 1 Suth. P. C. R., 574.
[3] 5 Bengal S. D. R., 282.

death) to which she succeeded, are *his* heirs surviving at her decease: so that, of several kinsmen of equal degree who would have jointly succeeded but for the widow, if any die in the *interim* between the deaths of the husband and the widow, their heirs are excluded."

In the case of *Balgobind Lal* v. *Rampertab Singh*, it was also decided that, according to the Hindu law, the property of a deceased person in the possession of his widow reverts at her death to the reversioners in *existence* at that time.[1]

Widow's rights according to Dayabhaga.

In the Dayabhaga School, the nature and extent of the widow's interest in the property inherited from her husband were determined in the case of *Kasinath Bysak* v. *Hurrosoondery Dossee*. This was an appeal to Her Majesty in Council from the late Supreme Court of Calcutta. The judgment of the Privy Council, dismissing the appeal, was delivered by Lord Gifford. The main points of Hindu law decided by this judgment, were the following:

Defined by the Privy Council.

Residence with her deceased husband's relations not compulsory.

1. "That a widow is not bound to live with her husband's relatives after the death of her husband, and that she does not forfeit her right of succession by removing from the family dwelling-house.

Absolute possession.

2. "That where the husband dies intestate and without issue, the widow is entitled to the absolute possession of the property descended from him, to enjoy it during her lifetime, and to dispose of it

[1] Bengal S. D. R. of 1860, p. 661.

LECTURE XVI.

And restricted power of alienation of the property left by him.

under certain restrictions. That the extent and limit of her power of disposing of the property are not definable in the abstract, but must be left to depend upon the circumstances of the disposition when made, and must be consistent with the law regulating such disposition.

Whether real or personal.

3. "That there is no distinction in this respect between the moveable and immoveable property so descended."

The Supreme Court decreed in August, 1819, that "Hurro Soondery Dossee should be declared entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her, as a widow of a Hindu husband dying without issue, in the manner prescribed by the Hindu law."

Lord Gifford, in delivering the judgment of the Privy Council, remarked :

"The main question discussed upon the appeal is one purely of Hindu law, whether the decree pronounced by the Supreme Court of Judicature in Bengal is right or wrong. This being a question purely of Hindu law, great care must be taken in coming to a decision upon that subject, in order to prevent the judgment of English Judges being warped by impressions made upon their minds in consequence of their habitual application of English law, and the nature of English decision to which they are accustomed upon such questions, and to consider in what way a Hindu Court of Justice would have

decided the point. Now, the authorities cited in the Court below, and before your Lordships, were two books of great authority—the *Vivada Chintamani* and the *Vivada Ratnakara*, with two other books, called the Dayabhaga and the *Dayatattva*, said to be the leading authorities in Bengal, in which part of India this question arose. Whether we refer to them, or to the opinion delivered by the Pandits, I say that these authorities concur in this proposition, that whatever may be the extent of power or control over the moveable or immoveable property of the deceased husband, she is entitled to the possession of both, and cannot be deprived of it by the husband's relations.

LECTURE XVI.

"With respect to the extent of the widow's interest, and the right of dominion over it, considerable difficulty may arise, if the authority of the books I have just mentioned, the *Chintamani* and the *Ratnakara*, prevailed in Bengal. It would seem that they would warrant the decree, that she was entitled to *an absolute right in the moveable property*, and a life-interest only in the real estate; but the Pandits say, that the authority of the *Ratnakara* and the *Chintamani* is overruled by the Dayabhaga and the *Dayatattva*, in which no distinction is made between moveable and immoveable property, and that, for many purposes, she has an absolute interest in both properties.

"After, therefore, a very anxious consideration of

Lecture XVI.

this case and the authorities, and after perusing the very able discussion which took place in the Court abroad, and was exhausted by the almost equally able discussion at the bar, it appears to me that the principle on which the Supreme Court of Judicature in Bengal has proceeded is the right principle,—namely, that, in the contest for the possession of this property between her and the relations of her husband, she is entitled to the possession of the property, but that *she is only entitled to enjoy it according to the rights of a Hindu widow.*"[1]

Mithila law.

In the Mithila School, where the doctrines of the Ratnakara and the Vivada Chintamani prevail, it is declared that "a childless widow succeeding to her husband's property has independent authority over the moveable part of her husband's estate, and *not* over the fixed property."[2]

"The authors of the Ratnakara and Vivada Chintamani contend," says Jagannatha, "that a wife cannot give away the *immoveable property* of her husband, which has devolved on her by the failure of male issue; but she may give away *moveable* effects; they expound the text of Katyayna—'The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may fru-

[1] Clarke's Notes of Decided Cases, p. 91; see also Goluck Money Debee *v.* Digumbur Dey, 2 Boul. Rep., 193; Phool Chand Dutt *v.* Rughoobun Sahoye, 9 W. R., 108; Nobin Chunder Chuckerbutty *v.* Issur Chunder Chuckerbutty, 9 W. R., 505.

[2] Clarke's Notes of Decided Cases, p. 99.

gally enjoy (the estate) until she die ; after her the legal heirs shall take it'—as relating to the personal estate of her husband, which has devolved on her."[1]

Lecture XVI.

In the case of *Srinarain Rai* v. *Bhya Jha*, which was to be decided by the Mithila law, the Pandits of the Sudder Dewanny Adawlut were consulted on the legal competency of the widow, Rani Indrawati, to make a donation of the estate, moveable and immoveable, which devolved on her on the death of her husband, of the profits of that estate during her possession, and of any landed property purchased by her out of such profits ; and it appeared to the Court from the opinions which the Pandits delivered, "that the widow was not competent to make a donation of any landed property without the express consent in writing of her husband's heirs and relations ; but that she might make a gift without their consent of *moveable property* of every description excepting slaves ; but that in all gifts it is made a condition, that half the husband's property be reserved for the due performance of his periodical obsequies."[2]

Absolute dominion over moveable property,

The rule then is, that a childless widow who may be the nearest heir of her husband has, under the Mithila law, an absolute right over all the *moveable* property left by him, and can alienate it to whomsoever she pleases ; but she takes only a limited interest in the *immoveable* property. Under the Mitakshara and the

which can be alienated by the widow at her pleasure.

Her interest in the landed property is limited.

[1] 2 Cole. Dig., 529 ; Vivada Chintamani, 262.
[2] 2 Select Reports, 36.

LECTURE XVI.

Dayabhaga law, a childless widow, succeeding to her husband, takes only a limited and restricted interest in his property, both moveable and immoveable. In this respect there is no difference between the Benares law and the Bengal law. In both the schools, however, a widow may make the fullest use of the usufruct of her husband's estate.[1]

Chastity a condition precedent to widow's right to inherit.

A chaste widow alone is entitled to the property of her husband. Unchastity is a bar to inheritance. Here a distinction ought to be made — unchastity *before* the death of her husband, and unchastity *after* his death. The rule of law is, that unchastity *before* the death of her husband disqualifies a widow from taking the heritage.[2]

Does incontinence on the part of the widow after inheriting an estate entail forfeiture of the same.

The question, whether a widow, who becomes unchaste *after* the death of her husband, should be deprived of the property which she inherited from him, has been very warmly contested. All Hindu instincts are against allowing an *unchaste* widow to retain the estate of her husband whose memory she has disgraced. Manu, Narada, Katyayana, Harita, and Sankha ordain, that "she must preserve unsullied the bed of her lord." There cannot be the least doubt that 'incontinency' in a woman was viewed by all the Hindu legislators as a heinous crime, which incapacitated her from performing any religious acts, and consequently

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[1] 9 W. R., 490.

[2] Mitakshara, II, 39; Dayabhaga, XI, 1. 48, 56; Vivada Chintamani, 290; Smriti Chandrika, 153; Mayukha, 77.

disqualified her from taking the property. In speaking of the heritable right of a widow, the Mitakshara says :—" It is fit that a chaste woman should succeed to the estate, rather than one appointed to raise up issue, reprobated as this practice is in the law, as well as in popular opinion. The succession of a chaste widow is expressly declared (by Vriddha Manu)—'the widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.'"[1] Narada goes so far as to say,—" Let him allow a maintenance to his widows for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the allowance must be taken away from them."[2] The text of Narada would seem to point to the conclusion that even a maintenance should not be continued to a widow, " if she did not keep unsullied the bed of her lord." If even a maintenance was directed to be resumed, *à fortiori* the wealth of her lord which she was not employing to secure spiritual benefit to her deceased husband, should be taken possession of by the next heirs of the deceased. Such would appear to be the plain meaning of the text of Narada.

LECTURE XVI.

It has been held, however, that " mere incontinence in a widow does not divest her of her right to an inheritance which has once vested in her."[3] The

Question answered in the negative by the Calcutta High Court.

[1] Mitakshara, II, 1, 18.
[2] Dayabhaga, XI, 1, 48.
[3] Matangini Debi v. Joykali Debi, 5 B. L. R., 466.

LECTURE XVI.

sensation in the Hindu community was very great when the case of *Kerry Kolitanee* v. *Moniram Kolita*[1] was being tried by the Full Bench of the Calcutta High Court. The question in this case was "whether, under the Hindu law as administered in the Bengal School, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity." The majority of the learned Judges were of opinion that the widow having once inherited the estate did not forfeit it by reason of her subsequent unchastity.[2] The case came in appeal before the Privy Council, and the decision of the Calcutta High Court has been affirmed. Their Lordships dwelt in their judgment, at some length, upon the two following texts of Vrihat Manu and Katyayana, since it was upon them that the arguments of the dissentient Judges of the Calcutta High Court were mainly founded. These two texts were as follows :

The decision upheld by the Privy Council.

"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share."[3]

"Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable

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[1] 13 B. L. R., 1.

[2] See Nehala *v.* Kishenlal, I. L. R, 2 All., 150 ; Bhobani *v.* Mohatab Koer, 2 All., 171 ; see also Parvati *v.* Bhiku, 4 Bom. H. C., 25.

[3] Vrihat Manu, Dayabhaga, XI, 1, 7.

protector, enjoy with moderation the property until her death. After her let the heirs take it."[1] LECTURE XVI.

Their Lordships were of opinion that these texts, neither expressly, nor by necessary implication, affirm the doctrine that the estate of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

Whose judgment is quoted at length.

In their Lordships' view "it has not been established that the estate of a widow forms an exception to what appears to be the general rule of Hindu law, that an estate once vested by succession or inheritance is not divested by any act which, before succession, or incapacity, would have formed a ground of exclusion from inheritance."

"According to the Hindu law," said the Privy Council, "a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Sivaganga case*[2]—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her state is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband, but whatever her estate is, it is clear that, until the termina-

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[1] Katyayana, cited in Dayabhaga, XI, 1, 56.

[2] 9 Moore's I. A., 604.

LECTURE XVI.

tion of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to, and died at the moment of, her death.

"If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated, and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews, sons of deceased brothers, the wife succeeds to the estate, and the surviving brother is her protector.[1] If he survived the widow, he, according to the Bengal School, will take the whole estate as sole heir to his deceased brother, and the nephews will take no interest therein, for brothers' sons are totally excluded by the existence of a brother.[2] The surviving brother may be advanced in years, the widow may be young. The probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in

[1] Dayabhaga, XI, 1, 57.

[2] *Ibid*, XI, 1, 5; 6, 1-2.

direct conflict with his moral duty of shielding her from temptation. But further, the widow has a right to sell or mortgage her own interest in the estate, or, in case of necessity, to sell or mortgage the whole interest in it. If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage. Again, if the surviving brother should die in the lifetime of the widow, all the nephews would succeed as heirs of the deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased by reason of an act of unchastity, committed in the lifetime of his father, and that, consequently, the estate had descended to his father in his lifetime, he would be entitled to the whole estate as heir to his father to the exclusion of his other nephews. Thus, the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband who, if the widow had remained chaste, would never have succeeded to the estate, and others who would otherwise have succeeded would be deprived of the right to inherit.

"Upon the whole, then, their Lordships, after care-

LECTURE XVI. ful consideration of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of the Judges was the correct one ; and it is important to remark, that the High Court at Bombay, in the case of *Parvati* v. *Vekhoo*,[1] and the High Court in the N. W. P., in the case of *Nehalo* v. *Kishen Lal*,[2] have given judgments to the same effect as that of the Full Bench at Calcutta in the present case."

Unchastity disqualifies all female heirs from succession.

Chastity is a condition precedent to the taking not only by the widow of her husband's property, but it is a condition precedent to the taking of the heritage by *all* female heirs.

In the case of *Ramnath Tolapattro* v. *Durga Sundari Debi*,[3] the question was, whether a mother, guilty of unchastity before the death of her son, is, by the Hindu law, precluded from inheriting his property. It was *held*, that unchastity in this case precluded the mother from taking the inheritance. Mr. Justice Mitter, in delivering the judgment, remarked :

" As a general rule, females, according to the Hindu law, have no right of inheritance. The widow, the daughter, the mother, the grandmother, and the great grandmother are exceptions to this general rule. But their right of inheritance is subject to certain special rules. These rules have been at some length discussed and enunciated by the author of the Daya-

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[1] 4 Bom. H. C., 25. [2] I. L. R., 2 All., 150.
[3] I. L. R., 4 Calc., 550.

bhaga in the chapter on inheritance of the widow. But they are intended to apply to all the individuals of this exceptional class. LECTURE XVI.

" Three special rules relative to the succession of the widow are deducible (from the Dayabhaga) :

" 1*st.* That an unchaste wife does not inherit her husband's property.

" 2*nd.* That when the widow inherits, she can only enjoy the estate with moderation, but cannot exercise the ordinary rights of alienation of a male owner.

" 3*rd.* That, after her death, her heirs do not succeed, but the heirs of the last owner succeed.

" These three special rules, I think, are applicable to the succession of all females who constitute the aforesaid exceptional class.

" The authority of Raghunandana is acknowledged and respected universally in the Bengal School. Commenting on XI, 5, 31 of the Dayabhaga, he says :—' The word *wife* implies females generally.' In the text of Katyayana, ' let the childless widow, preserving unsullied, &c.,' and in the first-half of the next text of the same sage, *viz.*, ' the wife *who is chaste* takes the wealth of her husband,' the word *wife* is illustrative. According to the rule of construction deducible from reason that a text used in one part of the *shastra* has the same import in another, both wife and daughter are impliedly meant by the use of the word *wife* (in these texts).

" It is evident that, according to Raghunandana,

LECTURE XVI.

the effect of XI, 5, 31, is to lay down generally for all females, as it has been repeatedly laid down for the wife, that chastity is a *sine qua non* for their right of inheritance."

It is not only in the Bengal School, but in all schools of Hindu law, the position of a woman in respect of inheritance is *the same*, whether she be a widow succeeding to her husband, or a mother succeeding to her childless son, or any other female heir. In all the schools of Hindu law, the female heirs forfeit their right of inheritance if they become *unchaste before* the succession opens out to them. The rule of construction which has been successfully applied to the Dayabhaga in excluding all unchaste female heirs, may also be applied with the same force of reasoning to the text-books of the other schools of Hindu law.[1]

Yajnavalkya and his great commentator quoted in proof of the existence of the positive rule that incontinence in a woman deprives her of her legal rights.

Before I conclude this subject, I would draw your attention to the following text of *Yajnavalkya:*

"An adulteress is to be allowed to live, *deprived of her authority*, dirty, fed with a view to sustain life only, dishonored, sleeping on the bare ground."[2]

The Mitakshara, in commenting upon this verse, says:

"*Deprived of authority* means *deprived of authority over servants, right to maintenance, &c.*"

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[1] In Bombay an *unchaste* daughter is *not* excluded from inheritance. Advyapa *v.* Rudrava, I. L. R., 4 Bomb., 104.

[2] Yajnavalkya, I, 70.

The rule applies to females *in general*. It would appear from this text, that both *Yajnavalkya* and his great commentator contemplated that a woman guilty of unchastity should be deprived of maintenance, right to inheritance, and other incidental rights and privileges.

LECTURE XVI.

On failure of widows, the daughter of a childless man takes a life-interest in the property of her father.

Daughters.

For purposes of inheritance daughters are divided into the following classes :

Their classification.

In the Bengal School.

1. Unmarried.
2. Married.
   a. Mother of male issue.
   b. Likely to have male issue.

In all other Schools.

1. Unmarried.
2. Married.
   a. Unprovided.
   b. Enriched.

In *all* the schools of Hindu law, the unmarried exclude the married daughters.

In all the schools of Hindu law, the unmarried daughters supersede the married.

In Bengal, a daughter, " who is a widow, or is barren, or fails in bringing forth male issue, as bearing none but daughters, *or from some other cause*," is excluded from inheritance.[1] Daughters who are barren, or widows destitute of male issue, are

In Bengal, daughters of a certain description excluded from inheritance.

[1] Dayabhaga, XI, 2, 3.

115

LECTURE XVI.

excluded, "because," says Srikrishna, "they cannot benefit the deceased owner by offering (through the medium of sons) the funeral oblations at solemn obsequies."[1]

Property inherited by an unmarried daughter devolves at her death on her issue to the exclusion of her married sister and their male issue.

It has been held, that, in Bengal, an unmarried daughter succeeding to her father takes an *absolute* interest in his estate; and so the property inherited by her goes at her death to *her* heirs to the exclusion of her father's heirs. "According to the Bengal law," says the Calcutta High Court in the case of *Radhakissen Manjee* v. *Rajahram Mundul*,[2] "in default of son, grandson, great grandson, or widow, the unmarried daughter succeeds in preference to the married daughters, and should she subsequently marry, and die leaving male issue, her son will succeed to the exclusion of the married sisters and their male issue."

This is the present law on the subject. I would draw, however, your attention to the following text of the Dayabhaga:

"Since it has been shown by a text before cited,[3] that, on the decease of the widow in whom the succession had vested, the legal heirs of the former owner, who would regularly inherit his property if there were no widow in whom the succession vested, namely, the daughter and the rest, succeed to the wealth; therefore the same rule (concerning the former possessor's next heirs) is inferred, *à fortiori*, in

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[1] Dayabhaga, I, 3, 5. [2] 6 W. R., 147. [3] Dayabhaga, XI, 1, 56.

the case of the daughter and her son (dauhitra) whose pretensions are inferior to the wife's. LECTURE XVI.

"Or, the word *wife* (in the text quoted in XI, 1, 56) is employed with a general import ; and it implies, that the rule must be understood as applicable generally to the case of a *woman's* succession by inheritance."[1]

The rule is not of exceptional character.

The passage quoted above leaves no doubt that the interest which the unmarried daughter takes in her father's property is in no way exceptional. No female heir is a *full owner*. On their death, the person to succeed is the heir *at that time* of the last full owner. The rule, says the Dayabhaga, "must be understood as applicable *universally* to the case of a woman's succession by inheritance." In the case of the unmarried daughter, therefore, the heir of her *father* shall take the heritage at her death.

In the passage quoted above, the word *dauhitra*, or daughter's son ("in the case of the daughter and her son," &c.), may be misleading. It would seem at first sight as if the author of the Dayabhaga intended that the daughter's son also should take only a life-interest in the heritage. That such could not have been his intention is made clear by the text which immediately follows the one under notice. The rule that female heirs take only a life-interest "must be understood as *universally* applicable to the case of a

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[1] Dayabhaga, XI, 2, 30, 31.

LECTURE XVI.

woman's succession *alone (strimatradhikare)*." The daughter's son has been mentioned in connection with the daughter here, simply to show that his pretensions are inferior, like those of his mother, to the claims of the widow ; and the author of the Dayabhaga had not the remotest wish that the daughter's son should only take a life-interest. The daughter's son gives *parvana pindas*, and in virtue of that he takes *absolute* interest in his maternal grandfather's property.[1]

In Bombay, a daughter's inheritance is looked upon as her stridhan.

In Bombay, the property which a daughter takes by inheritance descends as *stridhana* to *her* heirs.[2] "The result appears to be," says the Privy Council, "that the Courts in Bengal and Madras have determined in a series of decisions that the daughter takes a qualified estate only. No doubt, in the Courts of Bombay, there have been rulings and *dicta* in favor of the view that she takes the entire property."

Under the Mitakshara law, property inherited by an unmarried daughter passes to her sister, although the former leaves a son surviving her.

Both under the Mitakshara and the Dayabhaga, "the unmarried daughter succeeds only in priority of her married sisters, and not to the ultimate exclusion of such sisters' right of inheritance from their father. Therefore, where a Hindu under the Mitakshara died leaving two daughters, one married and the other unmarried, and the latter succeeded to the father's estate, and then married and subsequently died leaving a son and her sister surviving her, it was held

[1] *See* Colebrooke's Dig., II, pp. 545, 549.

[2] Navalram *v.* Nankishor, 1 Bom. H. C., 209.

by the Calcutta High Court, that the sister was entitled to the property as the next heir of the father."[1]

In the Benares School, the disputed claim between the married daughters is settled by the criterion of relative poverty.

As regards 'unprovided' and 'enriched' daughters in the Mitakshara School, *comparative* poverty is the only criterion for settling the claims of daughters on their father's estate. In the case of *Audh Kumari* v. *Chundra Dai and others*, where two of four daughters brought suits claiming each a moiety of their father's estate, to the exclusion of the two remaining daughters, and such remaining daughters resisted such suits, on the ground that they were entitled to the whole estate, being poor and needy, while their sisters were rich, and it was found that such remaining daughters were, as compared with their sisters, poor and needy, the Allahabad High Court dismissed such suits.[2]

Thus, in the Benares School, a married daughter who is indigent succeeds to the inheritance of her deceased father in preference to a married daughter who is wealthy, and comparative poverty is the only criterion for settling their claims. No preference whatever is shown by the authorities recognized by the Benares School to a daughter who has, or is likely to have, male issue over a daughter who is barren or a childless widow.[3]

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[1] Dowlut Koer *v.* Burmadeo Sahoy, 14 B. L. R., 246.

[2] I. L. R., 2 All., 561; see also Baku Bai *v.* Manchha Bai, 2 Bom. H. C., 5; Poli *v.* Narotum Bapu, 6 Bom. H. C., 183.

[3] I. L. R., 3 Calc., 587.

LECTURE XVI.

No such rule in the Mithila School.

The Mithila law draws no distinction between indigent and wealthy daughters.[1]

The consequence, therefore, is, that, on failure of maiden daughters, the *married* daughters share the heritage *per capita.* A question would naturally arise, however, whether married daughters having or likely to have male offspring should be preferred to those who are widowed or barren. As the Mithila authorities do not ignore the *religious principle* in regulating the order of succession, the daughters who cannot benefit their fathers through their sons should naturally be postponed to, if not excluded by, their sisters who are, or likely to be, mothers of sons.[2]

Law of the Dravira School.

Barren daughters disinherited.

In the *Dravira* School, the *Smriti Chandrika* excludes barren daughters. The word 'unprovided' (unenriched) means, says the author, "unprovided with wealth and unprovided with offspring, such as barren daughters and the like, for daughters of the latter description are not at all entitled to inherit their deceased father's estate, they being incapable to confer on him spiritual benefits through the medium of their

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[1] Vivada Chintamani, 293.

[2] The learned compilers of Halhead's Code of Gentoo Laws remark: "Vachaspati Misra speaks to this effect, *viz.*, that if there is no daughter who has children, or likely to have them, then property shall go in equal shares to the barren daughter and to the daughter who is a childless widow; if of these barren and widowed daughters there be but one alive, she shall obtain the whole; if there be more, they shall receive equal shares."—Halhead's Gentoo Laws, p. 32.

offspring."[1] As it is quite clear that the capacity to confer spiritual benefit is the basis of the heritable right of the daughters, daughters with male issue would, as a matter of course, exclude sonless daughters.[2]

Daughter's interest extends for life only.

I told you that a daughter inheriting the property of her father takes a life-interest only in such property. She has, consequently, no power of alienation, except for certain specified purposes, beyond her lifetime. The heir of the father on her death takes the property as heir of the ancestor, and not as *her* heir.[3]

She is her father's heir, but not her mother's.

In the Bengal and the Benares Schools, the daughter takes the heritage in default of the widow. But it should be distinctly understood that the heritable right accrues to the daughter not on the death of her father, but *after* the death of her mother, though she is not the heir of her mother, but of her father. The daughter would have succeeded if her mother had died during the lifetime of her father. The daughter's right is only inferior to, but entirely independent of, the widow's right. Both under the Dayabhaga and the Mitakshara, the daughter is in no better situation than the widow. She does not take an absolute

Her legal position not better than that of the widow.

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[1] Smriti Chandrika, 175. But see Muthamal *v.* Sinani Amal, 4 Indian Jurist, N. S., 498. "Barren and sonless daughters are not excluded by daughters having male issue."

[2] Dorasawmy *v.* Oomamul, Mad., December 1852, p. 177.

[3] Deo Pershad *v.* Lujoo Roy, 14 B. L. R., 245. *See* also The Shivagunga zemindary case, 4 Indian Jurist, N. S., 111; Muttayan Chetti *v.* Sangiliviya Pandia, 4 Indian Jurist, 444.

Lecture XVI.

interest, as in the Bombay School, but only a qualified interest in her father's property.[1]

Non-cesser of the vested right.

"The right once vested in a daughter by inheritance does not cease until her death, notwithstanding she has become barren or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested. Where two daughters succeeded by inheritance to their father's estate, and one of them died leaving her sister, who had then become a childless widow, the property survived to her sister; because, like widows, the two daughters collectively were one heir to their father, and the disqualification of the survivor to inherit at that time did not destroy the right of survivorship which she had previously acquired by inheritance."[2]

Survivorship.

Daughter's son.

DAUGHTER'S SON.—The daughter's son succeeds in default of the daughter. He does not take a life-interest in the heritage, like his mother. He takes an absolute interest, and becomes a *full* owner. He becomes a fresh stock of descent, and at his death the devolution of the property is traced from him.[3]

Per capita rule.

The heritable right accrues to the daughter's son on failure of daughters. So long as a single daughter capable of inheriting is alive, he is excluded. The daughter is a nearer heir, and necessarily excludes

[1] 20 W. R., 102; 22 W. R., 54, 496.

[2] 23 W. R., P. C., 214.

[3] Sibta *v.* Badri Prasad, I. L. R., 3 All., 134.

those who are more remote. The sons of different daughters take *per capita*, and not *per stirpes*.[1]

LECTURE XVI.

Recognition as heir by Mithila Law.

It was very much doubted at one time whether the daughter's son is in the line of heirs in the Mithila School. We have shown that though the language of the Mithila text-books is not very clear, it cannot be doubted that the daughter's son was recognized by them as an heir. His position ought to be immediately after the daughter.[2]

Parents.

PARENTS.—In Benares and Mithila, the mother is preferred to the father; but in other schools the father takes the precedence.[3] The mother takes only a life-interest like other female heirs.[4]

Brothers.

BROTHERS.—The brothers come in next as heirs.

Precedence determined by the criteria of whole blood and association.

The brothers of the whole blood exclude brothers of the halfblood.[5]

If there be a competition between whole brothers associated and whole brothers unassociated, and between halfbrothers associated and halfbrothers unassociated, the former exclude the latter.

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[1] Amritalal *v.* Rajanikant, 2 I. A., 113; Ram Suruth *v.* Baboo Basudeo, 3 N. W. P. H. C., 168; Ramdhun Sein *v.* Kashikanth Sein, 3 Sel. Rep., 133.

[2] Surjakumari *v.* Gandharp Singh, 6 Sel. Rep., 168.

[3] Mitakshara, II, 3. 2; Vivada Chintamani, 299; Dayabhaga, XI, 3. 1; Smriti Chandrika, 182; Mayukha, 80.

[4] P. Bachi Raju *v.* Venkatapadu, 2 M. H. C., 402; Rughoobur Sahae *v.* Musst. Tulsee Konwar, 1 Bom. H. C., 117; Narsappa Lingappa *v.* Sankha Ramkrishna, 6 Bom., 215; see also Dowlut Koer *v.* Burma Deo Suhay, 22 W. R., 54.

[5] Mitakshara, II, 4, 6–7; Dayabhaga, XI, 5, 9, 12; Smriti Chandrika, 188.

LECTURE XVI.

The reunited halfbrother and the separated whole brother take the estate in equal shares.[1]

Srikrishna's summary of the rule.

Srikrishna thus concisely gives the rules on the subject:

"In the first place, the uterine (or whole) brother; if there be none, a halfbrother. But if the deceased lived in renewed coparcenary with a brother, then, in case of all being of the whole blood, the associated whole brother is heir in the first instance; but on failure of him, the unassociated whole brother. So, in case of all being of the halfblood, the associated halfbrother inherits in the first place, and on failure of him, the unassociated halfbrother. But if there be an associated halfbrother and an unassociated whole brother, then both are *equal* heirs."

Full Bench Ruling of the Calcutta High Court.

In the case of *Rajkishore Lahoory* v. *Gobind Chunder Lahoory*, the question was whether, by the Hindu law current in Bengal, a brother of the whole blood should succeed in the case of an undivided immoveable estate in preference to a brother of the halfblood. The question was referred to a Full Bench of the Calcutta High Court. The opinion of the Full Bench was delivered by Mr. Justice Macpherson:

"It appears to me that the Dayabhaga clearly shows that, where there has been no separation, uterine brothers take to the exclusion of halfbrothers. The difficulty which has been felt has arisen out of cl. 35,[2] and an erroneous idea that it and certain

[1] Mitakshara, II, 9. 7; Dayabhaga, XI, 5, 15. [2] Dayabhaga, XI, 5.

other propositions laid down as applicable to brothers, in cases where there has been a partial partition, or a separation and subsequent reunion, are applicable to cases in which there has been no partition.

"There is no possible question as to the superiority of the whole brother over the halfbrother as regards conferring spiritual benefits. So far, therefore, as concerns the principle which is the foundation of the whole Law of Inheritance in Bengal, the brother of the whole blood must inherit in preference to the brother of the halfblood.

"The rights of brothers as regards succession are discussed and declared in the Dayabhaga, Chap. XI, sec. 5. In cls. 9, 11, and 12, it is laid down broadly that the brother of the whole blood takes before the brother of the halfblood,—the latter being expressly placed (sec. 12) between the whole brother and the nephew, or brother's son; and the rest of the section is devoted to an argument as to what happens where there have been partition and reversion, whole or partial. The conclusion arrived at as the result of the discussion as to what is to happen where there have been partition and subsequent reunion, &c., is, that, if there has been a partition, and there are whole brothers and halfbrothers, the whole brothers take alone if there has been no reunion ; but a halfbrother, who has become reunited with the deceased, will share equally with a whole brother of the deceased who has not become reunited. The reunion in fact is con-

LECTURE XVI. sidered as advancing the halfbrother to a position better than that which he would otherwise have occupied, the reunion being treated as equal to blood—a result which of itself shows that the original position of the halfbrother was, according to Hindu law, inferior to that of the whole brother.

"We thus have it that—

"(*a*) applying the principle which is the basis of the whole scheme of inheritance propounded in the Dayabhaga, the whole brother, undoubtedly, succeeds in preference to the halfbrother;

"(*b*) in the Dayabhaga, sec. 5, cls. 9, 11, and 12, it is expressly said that the whole brother succeeds before the halfbrother; and elsewhere there are indications that the commentator accepted as a fact the superiority of the whole blood;

"(*c*) the son of a whole brother is expressly declared to rank before the son of a halfbrother; and the principle upon which this is declared applies equally to the case of brothers and halfbrothers;

"(*d*) when there has been a separation, a halfbrother who becomes reunited ganis by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited,—which proves that the original position of the halfbrother was inferior to that of the whole.

"There remains cl. 35, and the difficulties which it creates." After much discussion as to separation

and reunion, &c., it is said in cl. 34 :—" Therefore, if whole brothers and halfbrothers only (not reunited brothers of either description) be the claimants, the succession devolves exclusively on the whole brothers. Accordingly, Vrihat Manu says :— 'If a son of the same mother survive, the son of her rival shall not take the wealth. This rule shall hold good in regard to the immoveable estate. But, on failure of him, the halfbrother may take the heritage.'" Then comes cl. 35, where, with reference to the declaration just quoted,—" this rule shall hold good in regard to the immoveable estate,"—it is remarked :—" This rule is relative to divided immoveables. For, immediately after treating of such property, Yama says :—' The whole of the undivided immoveable estate appertains to all the brethren ; but divided immoveables must on no account be taken by the halfbrother.' " In cl. 36, the commentator proceeds to analyze this text of Yama, thus :—" 'All the brethren,' whether of the whole or halfblood. But among whole brothers, if one be reunited after separation, the estate belongs to him. If an unassociated whole brother and reunited halfbrother exist, it devolves on both of them. If there be only halfbrothers, &c." It is to be observed—and I think it is shown by cl. 36 that this is so—that, in the Dayabhaga itself, this text of Yama is introduced only as being connected with the matter under discussion, *viz.*, the succession in cases of

Lecture XVI.

LECTURE XVI.

separation with or without reunion, &c., and there really is nothing to lead to the supposition that it was referred to save as bearing on that matter, or that in quoting it in cl. 35 there was any intention of contradicting or throwing doubt on the law as already distinctly propounded by the writer himself in the earlier portion of sec. 5.

"On the whole, I am of opinion that, *in Bengal, the brother of whole blood succeeds*, in the case of an undivided estate, in preference to a brother of the halfblood."

It is settled law, then, that all other circumstances being equal, the whole blood excludes the halfblood; and an united brother takes in preference to the separated brother.[1]

Sisters recognized as heirs in Bombay.

SISTERS.—Sisters are not in the line of heirs, according either to the Mitakshara or the Dayabhaga.[2]

With regard to the heritable right of the sister, Vyavahara Mayukha says: "In default of her (father's mother) comes the sister; for, says Manu:[3] 'The wealth (of the deceased) goes to whoever is next among *sapindas* and the rest.'" Similarly, Vrihaspati:—Where a childless man (leaves) several

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[1] Kesab Ram Mahapatra *v.* Nandkishor Mahapatra, 3 B. L. R. (A. C.), 7; Ram Hari Sarma *v.* Trihiram Sarma, 7 B. L. R., 337.

[2] Rajkumari Kripamoyi Debi, S. D. A., 1845, p. 27; Bama Sundari *v.* Rajkristo, Sev., 742; Kalee Pershad *v.* Bhairabee, 2 W. R., 180; Anund Chunder *v.* Teetoram, 5 W. R., 215; Srimati Rakkini *v.* Kedarnath, 5 B. L. R., App., 87: *Mitakshara*—Ram Doyal Deb *v.* Musst. Magnee, 1 W. R., 227; Musst. Guman Kumari *v.* Srikant Neogi, Sev., 460.

[3] Manu, IX, 187.

Lecture XVI.

clansmen, *sakulayas* and *bandhavas*, whoever of them is the nearest takes the wealth (of the deceased). Being begotten in her brother's family (*gotra*), she possesses the qualifications of a *gotraja*. The community of *gotra* (does) not indeed (exist in the case of a sister). But the quality of being a *sagotra* is not mentioned here as being a condition (of the right of) taking the wealth (as heritage).[1]

In Bombay, then, sisters are heirs of their brothers.[2] Sisters, when they succeed, take equally. An unendowed sister has no prior right of succession over an endowed sister, such as an unendowed daughter has over an endowed daughter.[3]

Nephews.

Nephews.—The succession devolves first on the son of the whole brother, and if there be none, on the son of the halfbrother.[4]

Srikrishna says : " In default of brothers, the brother's son is the successor. Here also a nephew of the whole blood inherits in the first instance ; and on failure of such, the nephew of the halfblood ; but in case of reunion of co-heirs, and on the supposition of all being of whole blood, the associated son of the whole brother is in the first place heir ; and, on

Precedence determined by the rule of blood

[1] Vyavahara Mayukha, 81.

[2] Venayeck Amendrav *v.* Luxuma Baee, 7 Suth. P. C., 540 ; Sakparam *v.* Sitabai, L. R., 3 Bomb., 353 ; Kesserbai *v.* Valab Raoji, I. L. R., 4 Bomb., 188 ; Biru *v.* Khandu, I. L. R., 4 Bomb., 214 ; Lakshmi *v.* Dada Nanaji, I. L. R., 4 Bomb., 210.

[3] Bhagirthibai *v.* Baya, I. L. R., 5 Bomb., 264.

[4] Mitakshara, II, 4, 7, note by Balam Bhatta ; Dayabhaga, XI, 6. 2.

LECTURE XVI.

with reference to the fathers, and by that of union with reference to themselves.

failure of him, the unassociated nephew of the whole blood: or, on the supposition of all being of the halfblood, the associated nephew of the halfblood, is the first heir; and on failure of him, the unassociated nephew. But, if the son of the whole brother be separate, and the son of the halfbrother associated, both inherit *together*, like brothers in similar circumstances."

They take *per capita.*

The nephews take *per capita*, and not *per stirpes.*[1]

I have pointed out to you already what position the Vyavahara Mayukha gives to brothers and to sons of brothers of the halfblood.

Mitakshara on the right of a brother's son, his father having predeceased his uncles.

The Mitakshara says, that, "in case of competition between brothers and nephews, the nephews have no title to the succession; for their right of inheritance is declared to be on failure of brothers. However, when a brother has died leaving no male issue (nor any other nearer heir), and the estate has consequently devolved on his brothers indifferently, if any one of them die before a partition of their brother's estate takes place, his sons do in that case acquire a title through their father; and it is fit, therefore, that a share should be allotted to them, in their father's right, at a subsequent distribution of the property between them and the surviving brothers.[2] Thus, according to the Mitakshara, nephews do not share with their uncles, but they take a share which had vested in their father.

[1] Brajakishore, 9 W. R., 463.

[2] Mitakshara, II, 4, 8, 9.

Lecture XVI.

Brother's grandson.

BROTHER'S GRANDSON.—The son of the nephew is expressly declared in the Dayabhaga as an heir, whose place is immediately after the brother's son. "Here likewise the distinction of the whole blood and half-blood, and that of reunited parceny and disjoined parceny, must be understood."[1]

I have shown that, according to the Mitakshara also, the brother's grandson is an heir, and his natural place is after the nephew of the deceased. There are decisions to the effect that the brother's grandson is an heir, but there is no judicial authority for fixing his exact position in the line of heirs.[2]

The brother's grandson exhausts the line of the father. The course of succession which should be followed after him, has been dwelt upon at length, and I will not repeat here the results we arrived at in a previous Lecture.

Strangers.

In default of agnates and cognates, the succession devolves upon certain strangers. You know already who these strangers are. It is necessary, however, to draw attention to certain decisions with regard to ESCHEAT to the Crown.

Law as to escheat.

You remember that the KING is the *ultimus hæres* in Hindu law. "The KING," says the Mitakshara, "may take the estate of a Kshatriya or other person of an inferior tribe, on failure of heirs down

[1] Srikrishna's summary.

[2] Kureem Chand v. Oodung Gurain, 6 W. R., 158; Musst. Ooriya Koer v. Rajoo Nye, 14 W. R., 208.

LECTURE XVI.

to the fellow-student."[1] The Dayabhaga also is of the same opinion. The two schools also agree in stating that the KING is never entitled to the estate of a deceased Brahmin.[2]

Laid down by the Privy Council.

The doctrine of escheat to the Crown in the case of a vacant inheritance was much considered by the Privy Council in the case of *The Collector of Masulipatam* v. *Cavaly Vencata Narainapa.*[3]

In this case the property in question was a zemindari. The last male zemindar had died, leaving a widow, who took a widow's estate, and upon her death there were no heirs of her husband to inherit the zemindari. The zemindar was, however, a Brahmin; and the point raised in the suit was, that on that ground the estate was not subject to the law of escheat. The contention was founded on the text of Manu, which says:—"The property of a Brahmana shall never be taken by a King: this is fixed law;" and also on a passage in Narada, where it is said:—"If there be no heir of a Brahmana's wealth, on his demise, it must be given to a Brahmana, otherwise the King is tainted with sin." It seems to have been admitted in this case that the British Government has at least the same rights that the ruling power would have had under the Hindu law, the question being whether that

[1] Mitakshara, II, 7. 6.

[2] Mitakshara, II, 7. 5; Dayabhaga, XI, 6, 34.

[3] 1 Suth., 417.

limitation which the Hindu law was said to impose on the right of the Hindu King was to prevail against or fetter the rights of the Crown. Lord Justice Knight Bruce, delivering the judgment of the Judicial Committee, said :—" It appears to their Lordships that, according to Hindu law, the title of the King by escheat to the property of one dying without heirs ought, as in any other case, to prevail against any claimant who cannot show a better title ; and that the only question that arises upon the authorities is, whether Brahmanical property so taken is in the hands of the King subject to a trust in favor of Brahmins." And in a subsequent passage of the judgment he went on to say :—" Their Lordships, however, are not satisfied that the Sudder Court (of Madras) was not in error when it treated the appellant's claim as wholly and merely determinable by Hindu law. They conceive that the title which he sets up may rest on grounds of general or universal law. The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If upon her death there had been any heirs of her husband, those heirs must have been ascertained by the principles of Hindu law ; but by the reason of the prevalence of a state of law in the *mofussil*, which renders the ascertainment to take on the death of an owner of property a question substantially dependent on the

LECTURE XVI. status of that owner. Thus, the property being originally, and remaining, alienable, might have passed by acts *inter vivos* in succession to a British subject, to a foreign European owner, to an Armenian, to a Jew, to a Hindu, a Mahomedan, a Parsee, or to any other person, whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindus and Mahomedans by positive Regulation ; in other cases it rests upon the course of judicial decisions." And the final conclusion of the Committee is thus stated : "Their Lordships' opinion is in favor of the general right of the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs ; and they think that the claim of the appellant to the zemindari in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely or to the extent of a valid and subsisting charge, defeated by the acts of the widow in her life-time. In the latter case the Government will of course be entitled to the property, subject to the charge."

In a subsequent case relating to the same estate—*Cavaly Vencata Narainapah* v. *The Collector of Masulipatam*—the question was between the Collector, repre-

senting the Government, and a person claiming to have a valid and subsisting charge by an act of the widow, a charge which the widow was competent to create; and it was held, that the Government took subject to the charge, and the suit was dismissed, but without prejudice to the right of the Collector, as representing the Crown, to redeem the charge and recover the estate."[1]

LECTURE XVI.

Legal heirs failing, the Crown takes the property subject to trusts, &c., if any.

The principle then is established that, where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it.[2]

Heirs to property left by ascetics.

A hermit may have property, and an ascetic "has clothes, books, and other requisite articles."[3]

It is necessary sometimes to determine the persons who should inherit their property.

"The heirs to the property of a hermit, of an ascetic, and of a student of theology," says the Mitakshara, "are, in order (that is in the inverse order), the preceptor, a virtuous pupil, and a spiritual brother belonging to the same hermitage."[4]

"The goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil, and the holy preceptor take. On failure of these, the associate in holiness, *or person belonging to the same order*, shall inherit."[5] Thus, Yajnavalkya

[1] 11 Moore's I. A., 619.
[2] Sonet Koer v. Himmut Bahadoor, I. L. R., 1 Calc., 391.
[3] Mitakshara, II, 8. 8. [4] Mitakshara, II, 8. 2. [5] Dayabhaga, XI, 6, 35.

LECTURE XVI.

says: "The heirs of a hermit, of an ascetic, and of a professed student, are, in their order (that is inverse order), the preceptor, the virtuous pupil, and *the spiritual brother and associate in holiness.*"[1]

"Associate in holiness."

Srikrishna, commenting upon the text of Yajnavalkya, says :—"'An associate in holiness' means a person who is of the *as'rama*, or holy place,—that is, he who is engaged in the same pilgrimage, or sojourns in the same hermitage."[2]

Interpretation of the phrase by the Calcutta High Court.

In the case of *Khuggender Narain Chowdry* v. *Sharupgir Oghore Nath*,[3] the point raised was, whether a *stranger*, though of the *same order of* ascetics, should be entitled to succession.

"The plaintiff claimed in right of heirship of the former *shebait*, and as the person conducting the worship of the idol, he claimed possession of the lands in suit. It was admitted on all hands that the plaintiff was never an associate in holiness, and in fact was never personally acquainted with or lived with the previous *shebait*. The Court below held, that he was a person belonging to *the same order* as the previous shebait, and was, therefore, entitled to succeed. Justice Morris, who delivered the judgment in this case, accepted the interpretation given by Srikrishna of the words *associate in holiness*." The word thus signifies the person who lives in the same hermitage. There is nothing, therefore, in the original (Dayabhaga) to justify the translation belonging '*to the*

[1] Yajnavalkya, II, 138. [2] Dayakrama, I, 10, 36. [3] I. L. R., 3 Calc., 543.

same order,' in the sense of a particular order of priesthood or class of ascetics. All that the text conveys is, that the person who has occupied the same hermitage with the previous ascetic is entitled to succeed him. And this interpretation is confirmed by the language of *Yajnavalkya*.[1] We gather, therefore, from this, that the principle of succession is based entirely upon fellowship and personal association with the ascetic, and that a stranger, though of the same order of ascetics, is excluded.

LECTURE XVI.

One living in fellowship and personal association.

"The mere fact of a person becoming a *bairagi* does not divest him of all rights of property which he may have possessed. He may become a *bairagi*, and may not at the same time cut off his connection with all worldly interests. He is not *dead* to the world, and is, therefore, still amenable to the laws regulating the succession of property. Had he *completely* severed himself from all worldly interests, the ordinary law of inheritance would not have regulated the devolution of his wealth. If he chooses to retain possession of, or to assert his right to, property to which he is entitled, he is perfectly at liberty to do so. On his death the succession to this property devolves on his natural heirs, and the rules determining the right of succession to the property of *hermits or ascetics* will not apply."[2]

Bairagis not divested of civil rights as such.

Succession to their property regulated by ordinary rules.

[1] Yajnavalkya, II, 138.

[2] Khoderam *v.* Rookhinee, 15 W. R., 197; Jagannath *v.* Bidyanund, 1 B. L. R., A. C., 114; Dukharam Bharti *v.* Luchmun Bharti, I. L. R., 4 Calc., 954.

LECTURE XVI.

Illegitimate sons, their rights.

Maintenance when they belong to the three regenerate castes.

The general result of the examination of the authorities, both juridical and forensic, is, that among the three regenerate classes of Hindus (Brahmans, Kshetriyas, and Vais'yas) illegitimate children are entitled to maintenance, but cannot inherit, unless there is local usage to the contrary; and that, among the Sudra class, illegitimate children, *in certain cases at least*, do inherit.[1]

Mitakshara on their rights to succession when they belong to the Sudra caste.

The Mitakshara, referring to the heritable right of an illegitimate son of a Sudra, says :—

"The author (Yajnavalkya) next delivers a special rule concerning the partition of a Sudra's goods :— 'Even a son begotten by a Sudra on a female slave (dásí) may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers, may inherit the whole property, in default of daughter's sons."[2]

"The son begotten by a Sudra on a female slave (dásí) obtains a share by the father's choice, or at his pleasure. But, after the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share,—that is, let them give him half (as much as is the amount of one brother's allotment). How-

[1] Chuoturya Ranmardan Syn v. Saheb Perlahd Syn, 7 Moo. I. A., 18; Inderum Valengypooly Taver v. Ramaswamy Pandia Talaver, 7 Suth. 267; Rahi v. Govida, 1 Bom., 97; Narain Dhara v. Rakhal Gain 1 Calc., 1.

[2] Yajnavalkya, II, 134, 135.

ever, should there be no sons of a wedded wife, the sons of a female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only.

LECTURE XVI.

"From the mention of a Sudra in this place, (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance."[1]

Expounded by the Bombay High Court.

The High Court of Bombay thus interprets the words of the Mitakshara :

"The result of the foregoing commentary appears to us to be, that Vijnanesvara holds, that, among Sudras, the father of an illegitimate son by a *dásí* may, in his (the father's) lifetime, allot to such son a share equal to that of a legitimate son; and if the father die without making such an allotment, the illegitimate son by the *dásí* is entitled to half of the share of a legitimate son ; and if there be no legitimate son, no legitimate daughter, or son of such a daughter, the illegitimate son by the *dásí* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son ; and such daughter, or daughter's son, would take the

[1] Mitakshara, I, 12.

LECTURE XVI.

residue of the property, subject, of course, to the charge of maintaining the widow of the deceased proprietor."[1]

Son of a concubine considered as the son of a female slave.

It was held by the Bombay High Court, that, for the purposes of inheritance, the son of a concubine should be considered as a *dási-putra*, or son of a female slave. "In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras, are on the same level as to inheritance as the issue of a female slave by a Sudra."

Allahabad High Court's view of the same.

The Allahabad High Court followed the Bombay ruling in the case of *Sarasati* v. *Maume*.[2] "There is authority," says the Court, "for holding that there is no such distinction as is contended for between a son born of a female slave and of a concubine."

Bengal High Court lays down no sweeping rule.

The Calcutta High Court, in the case of *Narain Dhara* v. *Rakhal Gain*,[3] holds, that so far as the districts governed by the Bengal School are concerned, it is *not* correct in laying down broadly that *all* illegitimate sons of Sudras succeed to the inheritance of their father.

Certain descriptions of illegitimate sons entitled to inherit in the absence of legitimate issue.

According to the doctrines of the Bengal School, a certain description only of illegitimate sons of a Sudra by an unmarried Sudra woman is entitled to inherit to their father's property in the absence of legitimate issue, *viz.*, the illegitimate sons of a Sudra by a female slave or a female slave of his slave.

Mr. Justice Mitter, by whom the judgment of the

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[1] 1 Bom., 104. [2] 2 All., 134. [3] 1 Cal., 1.

Court was delivered, pointed out the inaccuracy which had crept into Colebrooke's translation of the passage of the Dayabhaga bearing upon the point. The passages referred to should, when correctly rendered, stand thus :—

LECTURE XVI.

"But the son of a Sudra by an *unmarried* female slave, &c., may share equally by consent of the father." "Having no other brother *begotten on a married woman*, (he) may take the whole property, provided there be not a daughter's son."[1]

The Dayabhaga law on the point

If you carefully examine the passage of the Dayabhaga referred to, you will find that Jimutavahana not only insists upon the condition, that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter, she should not only be *an unmarried* Sudra woman, but that she should also be *a female slave*.

is based on Manu's text.

The Dayabhaga law on this subject is based upon the texts of Yajnavalkya, which have already been quoted,[2] and the following text of Manu:[3]

"A son begotten by a Sudra on his female slave (dásí), or on the female slave of his slave, may take a share of the heritage, if permitted; thus is the law established."

Kulluka Bhatta, in commenting upon this passage, says:—

Kulluka Bhatta's

"The son of a Sudra born of a *dásí*, *i.e.*, a female

[1] Dayabhaga, IX, 29—31. [2] Yajnavalkya, II, 134, 135.
[3] Manu, IX, 179.

LECTURE XVI.

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commentary thereon.

slave of the description mentioned already (in another place), *viz.*, one made captive under a standard, &c., or of a female slave belonging to a slave, shall, with the father's consent, take an equal share with the sons of a married female. This is the fixed law."

The son of a particular description of *dásí* only then gets a share of the inheritance. Kulluka Bhatta refers here to Manu, VIII, 415.

"There are slaves of seven sorts; one made captive under a standard, *or in battle*, one maintained in consideration of service, one *born of a female slave* in the house, one sold, or given, or inherited from ancestors, and one enslaved by way of punishment."

Jagannatha Bhatta.

Jagannatha, in explaining the above says:[1]—"'*Maintained in consideration of service*'—who has agreed to slavery in consideration of maintenance, whether in a season of scarcity, or abundance."

We thus see that the essential condition in these persons is that they must be *slaves*. A *dásí* then is not a common woman kept in concubinage. She must be *a slave*.

We have also the authority of Dattaka Mimansa and Smriti Chandrika for saying that that woman alone is a *dásí* "who has been purchassd for value paid."[2]

Dattaka Mimansa's explanation of the term '*dásí*.'

The Dattaka Mimansa says, that "that female, though of equal class, who being purchased by a price, is 'enjoyed,' is denominated by former sages a *dásí*."

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[1] 2 Cole. Digest, 17. [2] Dattaka Mimansa, IV, 76; Smriti Chandrika, 151.

There is nothing in this passage to show that the author thought that *a common kept woman* was within the definition of a *dásí*. On the contrary, it is quite clear that a purchased female slave alone of the Sudra class was regarded as a *dásí*.

Distinction between a concubine and a female slave.

The Allahabad High Court observes, that "there is authority for holding that there is no such distinction as is contended for between a son born of a slave and of a concubine."[1] We would submit with due deference that a distinction *is* observed by the text-writers between a female slave and a concubine. The word for female slave is *dásí*, and the word for a concubine is *avaruddhá*.[2]

If you examine the passages of the Mitakshara in which the terms *dásí* and *avaruddhá* are used, you will find that a sharp distinction was observed between these two classes of females. A *dásí*, whose son was entitled to inheritance, must have been enjoyed; but it does not surely follow from this that females who are kept as concubines should be regarded as *dásí*. The author of Madana Parijata, the great commentator of the Mitakshara, in commenting on the text referred to by the Mitakshara in I, 4, 22, says, that "women are of two descriptions, *dásís* or female slaves, and *avaruddhás* or concubines." Had the term *dásí* included concubines, it would not have been necessary to distinguish the

[1] 2 All., 136.

[2] Mitakshara, I, 422; II, 1, 28.

LECTURE XVI.

one class of females from the other. But as we find that a clear distinction was observed between them, we are bound to take notice of the fact, and maintain that, according to the doctrines of the Hindu law, "a certain description only of illegitimate sons of a Sudra is entitled to inherit the father's property in the absence of legitimate issue, *viz.*, the illegitimate sons of a Sudra by a female slave, or a female slave of his slave."

Among the Sudras the only illegitimate sons entitled to inherit are those born of a female slave, or of a slave's female slave.

Their status affected by Act V of 1843.

As slavery has been abolished in India by Royal authority,[1] we may say in the language of the text-writers, that the illegitimate son of a Sudra by a slave woman "is prohibited in the present age." The chapter, therefore, in the text-books which treats of the heritable rights of the illegitimate sons of a Sudra by a slave mother, is an obsolete branch of Hindu law.

Shares of the illegitimate children when they are entitled to inherit.

Those, however, who maintain that "the illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra," would have thus to define their rights: "On failure of a legitimate son by a wedded wife, the illegitimate sons are entitled to the whole property."

When there are legitimate sons, the illegitimate son takes only half the share of a legitimate son. If there be a daughter's son, then, in the *Bengal School*, the illegitimate son takes an *equal* share with him.[2]

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[1] Act V of 1843.

[2] Dayabhaga, IX, 31; Dayakrama, VI, 1, 32—35; 2 Colc. Digest, 325.

If there be a widow or a daughter only, the widow or the daughter, in analogy to the daughter's son, should take an *equal* share with the illegitimate son.

LECTURE XVI.

For, "If any even," says the Dattaka Chandrika, "in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate; but, on the contrary, shares *equally* with such heir."[1]

In the *Mitakshara School*, the rule would be different. The illegitimate son should not share *equally* with a widow, a daughter, or a daughter's son, but should take only a half share. Thus, if x be the share of an illegitimate son, the share of the widow, or the daughter, or the daughter's son should be $2x$.

$$x + 2x = 1$$

Thus, if there be *two* illegitimate sons, and *three* legitimate sons, the equation would stand thus:

$$2x + 6x = 1$$

The share of each illegitimate son is *one-eighth*, and of each legitimate son is *one-fourth*, of the property.[2]

They cannot succeed to the property left by their putative father's collaterals.

There is no law, it is said, enjoining the son of a Sudra born of a *dásí* mother to share the estate of collaterals. The illegitimate issues inherit only to their putative father's estate, and are excluded altogether from succession to the property of their putative father's collateral relations.[3]

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[1] Dattaka Chandrika, V, 31. [2] Mitakshara, II, 12. 2.

[3] Nissar Murtogah *v.* Kowar Dhunwant, Marshall, 609.

Lecture XVI.

The reason of this rule is not obvious.

We do not know on what ground the son of a *dásí* can be excluded from the property of collaterals. The son of a *dásí* takes the entire property of his father on failure of legitimate children, and he takes half a share in competition with brothers born of a wedded wife of his father. We thus find that the son born of a slave mother was treated in many respects as an adopted son. If he be looked upon as an adopted son, there is no reason why he should not get the rights belonging to such a son. If adopted sons then are not only heirs to the adopter, but also to kinsmen, there is no reason why the son of a *dásí* should not, by all the analogies of Hindu law, and the plain rules of equity and justice, be entitled to the property of collaterals. Nay, we may go a step further. He should not only inherit lineally and collaterally, but should also, like adopted sons, be entitled to the property of cognate relatives of his putative father.

"The Hindu law," says the Madras High Court, "does not, like the English law, consider an illegitimate person *quasi nullius filius*. It recognizes his relationship to his father and family, and secures him substantial rights." [1]

Illegitimate son of one of the mixed classes.

Be that as it may, the illegitimate son of one of the mixed classes, between the second and third of the regenerate classes, for instance, "has no title to

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[1] Pandaiya Telaver *v.* Puli Telaver, 1 Stokes, 478.

inherit by the ordinary rules of Hindu law, and the circumstance that the father was illegitimate does not alter the law." [1]

Lecture XVI.

Status of children begotten by an Englishman on a Brahmin woman.

In the case of *Mayna Bai* v. *Uttaram*, an Englishman lived with a Brahmin woman (living apart from her husband), by whom he had two sons. It was *held*, that the sons were Hindus, and the question of their right was to be solved by the determination of the class of Hindus to which they belonged and the rules as to inheritance which existed in that class. It was also *held*, that they should be regarded as Sudras, or as a class still lower, and that, in the absence of preferable heirs, they should inherit the property of their mother, and of one another.

In delivering the judgment, the Court said :—

Maina Bai v. Uttaram.

"Certainly, there are many passages of the text-writers which recognize the relationship of the son, irregularly begotten, to his mother's family. Yajnavalkya, quoted in the Vivada Chintamani :[2]—'A damsel's child is one born of an unmarried woman. He is considered as the son of his maternal grandsire.' This passage clearly recognizes the mother and her son irregularly begotten as cognate; and the Mitakshara, quoting Manu,[3] points out, that if the girl is married, the child, although not begotten by the husband, becomes his son. The authorities as to the son

[1] Gajapati Harikrishna *v.* Gajapati Radhica Pattu Mahadevi, 2 Mad. H. C., 369.

[2] Page 283.

[3] Manu, I, 11. 7.

LECTURE XVI.

of concealed origin also bear upon this point, and seem to show clearly that the Hindu law, although for obvious reasons not recognizing as the husband's son one begotten by a man of unequal class, nevertheless gives no ground whatever for supposing that the circumstance of birth from illicit connection severs the union between the mother and her son, so as not to admit of heritable blood between them. This being so, there seems no ground either of authority or analogy that if Tankaram (one of the illegitimate sons) had died without issue, his mother would not have succeeded to him. This would equally have been the case if she was a Sudra, or of a class still lower, as we think that, in the view of Hindu law, she was. That the illegitimate offspring of the women of the lowest Hindu classes daily succeed to the property, *both of their mother and of one another*, without question or dispute, we can, upon our own experience, affirm. It would be illogical if it were otherwise. For the illegitimate son of a Sudra, in the absence of preferable sons, is his heir. That the property is almost invariably small of itself prevents any question coming before the Courts. Further, the practice is so well understood that litigation would be hopeless. We may refer by way of analogy to the practices of Malabar and Canara, which received Hindu law not in its present state, but in a condition of which traces are still observable in the books. There concubinage is the rule, and the whole law of inherit-

ance is based upon the existence of heritable blood between the mother and the son quite irrespectively of the father. There is then no agnation at all, nor does the archaism of the Hindu law in those provinces attenuate the force of the argument from analogy. The form of Hindu law provides for the state of a homogeneous people ; but even in Manu there are ample traces of a period in which various tribes intermixed with one another, when the rigid demarcation of the various classes had not yet been made. It is obvious that the present far more nearly resemble the more ancient than the more modern condition of the country. There is very little authority upon the question now at issue. All the passages to be found in the text-books have reference to the right of inheritance, *ex parte paterna*. In Madras, it has never been doubted, that the children of the prostitute succeed to the property of the mother. We have been unable to find the least authority either in the books or in practice for an opinion of Mr. Justice Strange that the children must be adopted children. LECTURE XVI.

"Our reasoning, therefore, is, that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Tankaram (one of the illegitimate sons) and his brother are decided to be Hindus. They are the Hindu sons of a woman, who was either a woman of a class lower than the fourth of Manu's classes ; and in this case, the sons are cognate to her and to one another, as

LECTURE XVI. the children of a class not twice-born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father, because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."[1]

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[1] 2 Stokes, 196.

Here the question may naturally arise as to what classes of Hindus should be denominated *Sudras*. As the Hindu law of inheritance, with regard to the right of succession of illegitimate children, varies, says the Privy Council (*Chuoturya Run Murdun Syn* v. *Sahub Purluhad Syn*, 1 Suth. P. C. R., 313), according to the different classes of the Hindus, it is necessary "to consider what those classes are, and were. It is undoubted that there were originally four classes: 1, the Brahmins; 2, the Khatris; 3, the Vaisyas; 4, the Sudras. The first three were the regenerate, or twice-born, classes; the latter. the servile class. It was contended that the Khatri and Vaisya classes have ceased to exist, and are sunk into the Sudra class, and that there are now two classes only—the Brahmin and the Sudra." "Courts, however, in all cases assume that the four great classes remain." "Their Lordships have no doubt, therefore, that the existence of the Khatri class, and of the Vaisya class, as two of the regenerate tribes, is fully recognized throughout India." (See also *Namboory Setapaty* v. *Kanoo Colanoo Pullia*, 3 Moore's Indian Appeals, p. 359.) The three regenerate classes exist it is true; but it often becomes difficult to distinguish a *Sudra* from one of the regenerate classes. We all know that a *Sudra* is not *dwija*, or 'regenerate;' but where are we to find the distinctive marks by which a given person may be easily known either as a *dwija*, or a *Sudra*? Even the wearing of the sacred thread, the well-known badge of the regenerate classes, cannot furnish in many cases an indubitable test in this vexed question. There are many *Thakurs* and *Banias* who, though they are universally recognized as members of the regenerate classes, do not put on the sacred thread.

The only safe rule to follow in all cases where the determination of the caste of a person is in question, is to ascertain the customs and usages by which the social conduct of the given person is regulated. The remarriage of widows, and the equal rights and privileges of legitimate and illegimate sons, and similar customs and usages, are marks by which a Sudra can be distinguished. It was by an enquiry into their customs

REUNION.—" Effects, which had been divided and which are again mixed together, are termed reunited. He to whom such appertain, is a reunited parcener.

LECTURE XVI.

Reunion, its legal import.

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and usages, that the caste rights and the legal status of the Jats, Gaujars, and Ahirs of the North-Western Provinces have been determined.

Cases often come up before the Courts in the North-Western Provinces in which it is necessary to determine whether a given person is a Sudra or a member of the regenerate classes. The Kayasthas of the North-West and Bombay, for instance, deny that they are Sudras; they claim to be recognized as members of the Kshatriya caste, and they justly say that they should be governed by the same laws by which the regenerate classes are governed. The word Kayastha occurs in Yajnavalkya (I, 336), Vishnu (VII), and Vrihat Parasara (X, 10), and the Puranas (Padma, Skanda, Bhavishya). The Mitakshara, in commenting upon the text of Yajnavalkya (I, 336), says, that " The Kayasthas are scribes and accountants ; they are shrewd and clever, and are favorites of the king." Now the scribes and accountants, according to the Viramitrodaya, are *dwijas*, or members of the regenerate tribes. By custom also they are recognized as members of the second order. The fact of their wearing the sacred thread, and above all reading Vedic Mantras on occasions of offering *homa*, or performing other religious ceremonies prescribed for Kshatriyas, leaves no room for doubt on the point. The decisions of the Courts have been based upon these indisputable facts, and in many instances, the Kayasthas have been acknowledged as Kshatriyas.

As regards the Brahmanas (of the ecclesiastical class), it is not very difficult to find out the exact subdivision to which a person belongs. The Brahmans are divided into the following principal classes:

Five Gauras ... {
1. Kanyakubja.
2. Maithila.
3. Gaura.
4. Sarasvata.
5. Utkala.

Five Darviras ... {
6. Maharashtra.
7. Dravira.
8. Gurjara.
9. Karnata.
10. Tailanga.

Besides these ten classes, there are secondary classes of Brahmans, such as the Mathura Chaubes, Sakaldwipis, and the Kashmiris, &c.

LECTURE XVI.

Between what persons it can be effected.

"That cannot take place with any person indifferently; but only with a father, a brother, or a pater-

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The Kshatriyas belong either to the Military class or the Civilian class. The Military classes are—

1. The Suryavansis.	3. The Aguivansis.
2. The Chandravausis.	4. The Rishivansis.

The Civilian classes are what are called *upa*-Kshatriyas, and are known as Kayasthas. The Kayasthas are subdivided into

I. *The Chitragupta vansis, viz.:*

1. Srívastavya.	7. Nigama.
2. Balmiki.	8. Bhattanagara.
3. Gauda.	9. Ashthana.
4. Mathura.	10. Sakhsena.
5. Suryadhvaja.	11. Ambashtha.
6. Kulasreshtha.	12. Karana.

II. *The Chandra Sena vansis.*

It is not very easy to define accurately the Vaisya (mercantile) class of Hindus. The line of demarcation separating them from the Kshatriyas on the one hand, and the Sudras on the other, has, in many instances, been completely obliterated. There can, of course, be no doubt that the Vaisya class still exists; but in many cases it is almost impossible to identify them. The Agarwalas and the Khatris, for instance, are said to belong to the Vaisya class. If a Khatri, however, be asked to what class he belongs, his invariable answer is, he is "a true Kshatriya." The tribal classification of the Bhuinhars and the Dhusars also is very much disputed, many among them claiming to be Brahmans.

Manu speaks of *herdsmen* and *barbers* as members of the "servile class" (IV, 254); (Yama, V, 20; Vrihat Parasara, Ch. VI, p. 210.) In other Codes (Parasara Sanhita) we meet also with the following principal classes of the Sudra caste:

1. *Mali*, flower-seller.	4. *Modaka*, confectioner.
2. *Taili*, oilmen.	5. *Varui*, seller of betel leaves.
3. *Tantri*, weaver	6. *Kulala*, potter.

7. *Karmakara*, blacksmith.

The Mitakshara (III, 265; see also Yama, V, 54; Angiras, 3; Atri, 29) mentions, on the authority of Apastamba, the following secondary (*antyaja*) classes of Sudras:

1. Washerman.	4. Seller of betel leaves.
2. Shoemaker.	5. *Kaivarta.*
3. A stage-player.	6. *Meda.*

7. *Bhilla.*

nal uncle, as Vrihaspati declares,—'He, who being once separated, dwells again through affection with LECTURE XVI.

Various mixed classes have now sprung up. The question as to the law of succession by which they should be governed is not easy to decide. Formerly, when intermarriage between different classes was not disallowed, the offspring of such marriage were governed by the law of one or other of the four principal classes, according to the status of their father or mother. (Manu, X, 40; Mahabharata Anusasana Parva, Ch. 48, vv. 4, 7, 8; Ch., 49, v. 17).

Do the Kayasthas of Bengal belong to any of the superior classes? In several cases which came up before the Courts, they were taken as Sudras (*Soshinath Ghose* v. *Srimati Krishna Sundari Dasi*, 4 Indian Jurist, N. S., 588.) The question, however, whether they belong to the *Sudra* class or not, though raised in some of these cases, was not decided. The question is a very important one, and should be considered in all its bearings. The Kayasthas of Bengal indignantly deny that they are Sudras, and several learned treatises have been written to prove that they belong to the *Kshatriya* class. (See Kayastha Kaustubha by Raja Rajnarayana Mitra Varma.)

See (1) Vyavastha No. 60 given by the Pandit of the Sudder Dewanee Adawlut, Agra, dated 15th July, 1861.

(2) Judgment of the Subordinate Judge of Ghazipore, No. 66 of 9th August, 1861, in *Re Mussummat Radhay* v. *Mussummat Rukmin*.

(3) Judgment of the Subordinate Judge of Patna, No. 26, dated 9th October, 1879, in *Re Musst. Ranato Kuar* v. *Musst. Rukmin Kuar*.

(4) Judgment of Pandit Bansedhur, Munsif of Tilhar, of 31st March, 1818, in *Re Sita Ram* v. *Sunder Lal*.

(5) Vachaspatya of Pandit Taranath Tarka Vachaspati, p. 1932.

(6) Hindi Translation of the Mitakshara by P. Durga Prasad Yajurvedi.

(7) Oudh Gazetteer (published by authority), Vol. II, p. 373.

(8) Kayastha Ethnology by Munshi Kaliprasad (reprinted in the Indian Jurist, New Series, Vol. I, pp. 368, 539, 610, and 759); also its Appendices I to V (printed separately).

(9) Review of the Kayastha Ethnology by Raja Luchman Singh, Deputy Collector, in conformity with the orders of the Government, N. W. P., No. 47A, dated 8th February, 1877.

(10) Steele's Law and Customs of Hindu Castes in the Bombay Presidency (1826), pp. 89, 94.

LECTURE XVI. his father, brother, or paternal uncle, is termed reunited.'"[1]

The enumeration of 'father,' &c., says the Viramitrodaya, is simply 'illustrative,' and not exhaustive; and the masculine gender is 'not intended to be significant.'[2]

"The author of the Mitakshara, by saying 'not with any person indifferently,' intends not to exclude the mother and the like, but only to lay down the restriction, that reunion must be preceded by partition, and based upon the distinct understanding, (that the property which is mine is thine, and that which is thine is mine); and thus excluding the union consisting simply in the admixture of goods in any way whatever (as amongst traders)."[3] Thus, according to the author of Viramitrodaya, reunion may be made by the parties, male or female, who once lived in union.

"A special association," says the Dayabhaga, "among persons other than the relations here enumerated (by Vrihaspati) is not to be acknowledged as a reunion of parceners; for the enumeration would be unmeaning."

Srikrishna is of opinion that "the son or other male descendants of a paternal uncle" may also be admitted to reunion; and *à fortiori* the descendants of a brother are also entitled to it. Jagannatha evidently

[1] Mitakshara, II, 9. 213. [2] Viramitrodaya, IV, 3, 4.
[3] Viramitrodaya, III, 13.

believes that "the father, &c.," in Vrihaspati's text comprehend all the *sapindas* in the Dayabhaga system of inheritance.[1]

LECTURE XVI.

As regards the order of succession among reunited coparceners, the rule of the Mitakshara is clear and simple. On failure of male issue, the surviving coparceners alone, and not the widow, &c., shall take the inheritance.

Order of succession among reunited coparceners according to the Mitakshara.

There is an exception to this general rule. The associated brother of the whole blood is *first* in the line of heirs. In default of him, an associated half-brother and an unassociated whole brother "shall take and divide the estate. Reunion is a reason for a halfbrother's succession. If there be only an associated halfbrother and an uterine sister, they inherit the estate and divide it in equal shares."[2]

The rule is easy to understand. Whole brothers and sisters and associated halfbrothers exclude all coparceners. On failure of them, the surviving coparceners take the share of the deceased *per stirpes.*

There is a passage, however, in another place in the Mitakshara which is well worthy of notice.[3] The author is discussing the heritable right of the widow. The following text of *Sankha* is quoted in the course of the discussion : "The wealth of a man, who departs for heaven, leaving no male issue, goes to his

[1] Colebrooke's Digest, 557. [2] Mitakshara, II, 9. 4.

[3] *Ibid,* II, 1, 35.

Lecture XVI.

brothers. If there be none, his father and mother take it, or his eldest wife."[1] "In my reverend teacher's opinion," says the Mitakshara, "the text of Sankha relates to a reunited brother."[2] The opinion of the 'reverend teacher' is evidently endorsed by the author.

"The author of the Mitakshara and others are of opinion," remarks Mitra Misra, "that this text refers only to reunion; consequently there is no inconsistency in the succession of the parents and the widow on failure of the brothers."[3]

Different from that laid down in the Viramitrodaya.

The fact is, says the Viramitrodaya, that, as regards the order of succession to reunited property, there is no fixed principle; hence this order rests entirely upon the authority of the texts of law.

"The property of a reunited sonless person goes to the brothers in the first instance, in their default to the father, in his default to the mother, and in her default to the virtuous wife.

"The widow takes only her husband's share in the reunited property ; and the other coparceners take their *own* shares.

"On failure of the widow, the sister gets the share.

"On failure of the sister, the unassociated *sapindas* and *samanodakas*, in order of their proximity to the deceased."[4]

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[1] Mitakshara, II, 1, 7.
[2] *Ibid*, II, 1, 35.
[3] Viramitrodaya, IV, 9.
[4] *Ibid*, IV, 9–11.

The order of succession given in the Viramitrodaya is thus materially different from that laid down in the Mitakshara. It is very doubtful whether the author of the Viramitrodaya is right in his interpretation of the passage of the Mitakshara referred to. To our mind the author of the Mitakshara never laid down the doctrine ascribed to him. He simply said that, in his 'reverend teacher's opinion' the text of Sankha referred to 'reunited property;' but he does not say what his own opinion in the matter was. In the chapter on reunion, he expressly says that the text of Yajnavalkya regulating succession to divided property would not apply to reunited property. The rules of succession to reunited property are *exceptional*. He then lays it down, that, in default of male issue and brothers, the principle of survivorship would apply. In face of such a clear and unmistakable expression of opinion, we shall not be justified in holding that the order of succession given in the Viramitrodaya is correct.

LECTURE XVI.

Rule applicable to all the schools of law.

You must understand, then, that where reunion has taken place, the brothers are *first* in the line of heirs. On failure of the brothers, the members of the reunited family and their descendants succeed to each other to the exclusion of the unassociated or not re-united branch. This rule is applicable to *all* the schools of Hindu law.[1]

[1] Tarachand *v.* Padmalochan, 5 W. R., 249; Gopal Chunder *v.* Kenaram, 7 W. R., 35; Bishwanath *v.* Gungadhar, 3 Bom. H. C. R., 69; Pran-

LECTURE XVI.

Exclusion from inheritance.

As regards exclusion from inheritance, Manu ordains: "Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage."[1] Yajnavalkya is not evidently satisfied with these grounds of disqualification alone. He is of opinion that "a person afflicted with an incurable disease and *others*"[2] must not also claim the heritage.

The words '*and others*' in Yajnavalkya's text are capable of bearing a very wide signification. The author of the Mitakshara, however, believes that "under the term '*others*' are comprehended one who has entered into an order of devotion, an enemy to his father, one who is guilty of a crime *in the third degree*,[3] and a person deaf, dumb, or wanting any organ."[4]

These persons are debarred of their shares, because they are incompetent to perform the religious rites which conduce to the spiritual welfare of the deceased.[5]

Blindness, &c.

Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disquali-

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kissen Paul Chowdhuri *v.* Mathura Mohun Paul Chowdhuri, 10 Moo. I. A., 403; Rampershad Tewari *v.* Sheo Churn Doss, 10 Moo. I. A., 506; Raja Suraneni Venkata Gopala Nara Sinha, 3 B. L. R., 41; Kuta Bully Viraya, 2 Mad. H. C. R., 235; 15 W. R., 442; 11 W. R., 500.

[1] Manu, IX, 201.

[2] Yajnavalkya, II, 141.

[3] Manu, XI, 60—67.

[4] Mitakshara, II, 10. 3.

[5] Dayabhaga, V, 4—6; Viramitrodaya, 256; Vivada Chintamani, 243.

fication.[1] Incurable blindness, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance.[2] The same remarks apply to those that are deaf or dumb. Their deafness and dumbness, to operate as grounds of disqualification, must be proved to have been congenital and incurable.[3]

Lecture XVI.

The loss of a sense or a limb is, according to Manu, a ground of disqualification. The term used by Manu, in the text quoted above, to signify a person who *is devoid of a sense*, is 'nirindriya.' The Mitakshara, in explaining this word, says: "Any person who has lost a sense by disease or other cause is said to be devoid of that sense."[4]

It would appear from these words that loss of a sense arising from any cause whatever is a bar to inheritance. "No doubt," says Justice Westropp, "the term *nirindriya* standing alone may indicate the loss of a sense, organ, limb, or member. We must depend upon the context to discover which of these meanings the Rishi intended it to bear. Seeing that Manu had already, in the same text, made express provision for the impotent, the blind, the deaf, the

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[1] Mahesh Chunder Roy v. Chunder Mohun Roy, 14 B. L. R., 273; Murarji Gokul Das v. Parvati Bai, I. L. R., 1 Bomb., 177.

[2] Uma Bai v. Padmanji, I. L. R., 1 Bomb., 557.

[3] Ballabhram Shivnaryan v. Bai Hari Ganga, 4 Bom. H. C., 135; Paresh Mani Dasi v. Dinanath Das, 1 B. L. R., 117.

[4] Mitakshara, II, 10. 4.

LECTURE XVI.

dumb, the insane, and the idiotic, we are strongly inclined to think that, by 'nirindriya,' he intended to provide for those who are deficient in a limb or member, and that Sir William Jones correctly interpreted his meaning. And we are strongly fortified in that conclusion by finding that it is that also of Vachaspati Misra in his Vivada Chintamani. Commenting on the text of Manu, he says : '*Those who have lost the use of a limb* signifies those who have been deprived of a hand, a leg, or any other member of the body. Such persons are not competent to perform ceremonies prescribed in the Vedas and Smriti. They are consequently not entitled to inherit paternal property.'

"But even assuming that Manu meant by 'nirindriya' to indicate deficiency in a sense or organ not already provided for, and that we should give a forced and unnatural construction to his language if we were to hold that, after expressly providing that congenital blindness or deafness should disqualify, he meant by 'nirindriya' that blindness or deafness from any cause should have the same effect. The rule *expressio unius, exclusio alterius*, might be properly applied, and would thus leave the phrase 'nirindriya' in the text of Manu and the 4th placitum of sec. x, chap. ii of the Mitakshara to operate not only where there is a deficiency of limb or member, but also a deficiency of any sense or organ not expressly provided for by Manu. We are not,

however, to be understood as deciding that a deficiency in any sense or organ is in those passages implied in the word 'nirindriya' as employed by Manu in chap. ix. pl. 201; or anything more than that he is not by that term to be understood as referring to deficiency in any sense or organ, for which deficiency he had already specially provided.

"Nilakantha, in the Mayukha, chap. iv, sec. 11, quotes, amongst other texts, that of Manu, without contradicting or qualifying it, but with this remark—that, as to the words, 'have lost a sense' (nirindriya), they mean 'deprived of the nose or the like.' . . . . But it is hardly probable that, if supervening deficiency in the more valuable senses of sight or hearing, or in the organ of speech, or in the reasoning faculty, were not permitted by Manu to work disinherison, he regarded a deficiency in minor senses of taste, touch, and smell as sufficient to produce that effect."[1]

There can be no doubt that the word 'nirindriya' in the text of Manu signifies those persons who are "devoid of a sense or organ," and who have not been already expressly mentioned in the first part of the verse. Those then who are deprived *from their birth* of any organ or sense are incapable of taking the heritage. It would follow that if a person be *totally* deficient in the senses of touch, taste or smell,

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[1] I. L. R., 1 Bomb., 185.

Lecture XVI. *from his birth*, the heritable right does not accrue to him. Supervening deficiency in a limb, organ, or sense does not work disinherison; but congenital defects, if incurable, are grounds of disqualification.

Lameness, &c. The lame and the cripple have been expressly excluded. The term lame, says Jagannatha, being contiguous to the word 'blind' (in the text of Yajnavalkya) must signify *born* lame. "In like manner, *persons deprived of the use of their hands* must signify such as are destitute of the use of both hands from the day of their birth," and they also are incompetent to inherit.[1] If a man has the use of one hand, or of one foot, inasmuch as there is no general or total failure of those organs, such a person cannot be excluded.[2]

Insanity, idiocy. Insanity and idiocy are grounds of exclusion. "A madman," says Jagannatha, "signifies one insane from his birth."[3] An idiot is "a person deprived of the internal faculty; meaning one incapable of discriminating right from wrong."[4] An idiot, continues Jagannatha, "is one devoid of knowledge of himself and others. An idiot is one whose intellectual faculties are imbecile."[5] "An idiot," says the Madras High Court, "is one of unsound and imbecile mind who has been so *from his birth*. The question of unsoundness and imbecility is to be determined not

[1] 2 Colebrooke's Digest, 437.
[2] 2 *Ibid*, 437.
[3] 2 Colebrooke's Digest, 432.
[4] Mitakshara, II, 102.
[5] 2 Colebrooke's Digest, 435, 436.

upon wire-drawn speculations, but upon tangible and unmistakable facts."[1] The mental incapacity which is to disqualify on the ground of idiocy is not utter mental darkness. If, however, a person is unfit for the ordinary intercourse of life, he is, as to all legal disabilities and incapacities, in the position of an idiot. LECTURE XVI.

There can be question that idiocy, to justify disqualification, must be proved to be congenital. But opinions differ as to the question whether lunacy, to become an impediment to inheritance, must also be congenital. Jagannatha, we have seen, is of opinion that that person alone is excluded from inheritance who is "insane from birth." It is believed, however, that, as madness is more a disease than incapacity of the mind, it must not be placed in the same category as blindness, dumbness, idiocy, &c. We are simply to ascertain whether a person was insane at the time the succession opened out. If he was insane at the time, he must be excluded. "A person need not be incurably insane in order to be incapable of inheriting, nor is it necessary to show, by clear and positive evidence, the absolute impossibility of a cure."[2] If it can be simply shown that a party was insane at the time when the succession opened, he is incapable of inheriting.[3]

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[1] Tirumamagul Ammal v. Ramasvami Ayyangar, 1 Mad. H. C., 214.

[2] 18 W. R., 305.

[3] Dwarika Nath Bysack v. Mahendranath Bysack, 9 B. L. R., 198; Brajabhukan Lal Ahasti v. Bichan Dohi, B. L. R., 204. See also 13 Moo. I. A., 519; 14 Moo. I. A., 176.

LECTURE XVI.

If we consider, however, the position of the term 'madmen' in the text of Manu,[1] we cannot resist the conclusion that, to justify exclusion, insanity must also be proved to be congenital. 'Madmen,' 'idiots,' and 'the dumb' form a compound word. As they are members of the same compound word, all the terms must be connected with the same qualifying epithet 'born.' In other words, born madmen, born idiots, and persons born dumb are excluded from a share of the heritage. If you say that, to justify disqualification on the ground of idiocy and dumbness, these two defects must be shown to be *congenital*, it stands to reason that you should also show that lunacy, in order to become a ground of disqualification, must also be proved to be *congenital*. You cannot give the last two terms of a compound an attribute which you deny to the first term of the word. You must either say that lunacy, idiocy, and dumbness must all be congenital, or you must say that they need not be congenital. But you are obliged to admit, that, in order to be grounds of disqualification, idiocy and dumbness must be ascertained to be congenital. You have, therefore, no other alternative but to admit that a madman, to be incapable of inheriting, must be *born insane*.[2]

Incurable disease.

An incurable disease, according to Yajnavalkya,

[1] Manu, IX, 201.

[2] It is a question for Medical Jurisprudence whether a person can or cannot be *born* insane. On this point we do not venture to offer an opinion.

is an impediment to inheritance. It is very difficult, however, at the present day, to say what diseases are 'incurable.' Where it is contended that a person is incapable of inheriting by reason of an incurable disease, the strictest proof of the incurability of the disease will be required.[1] Leprosy in certain forms is said to be incurable. "It is a well-known fact in medical science," said the Madras Sudder Court, "that the disease of leprosy assumes in some cases a mild and curable form, while in others it appears in a virulent and aggravated type. The Sudder Court find, on consulting the best authorities on the subject, that it is in the latter case only that the disease is regarded by Hindu law as a disqualification entailing forfeiture of inheritance."[2]

Leprosy then, to be a ground of disqualification, must be of the sanious or ulcerous type.[3]

The Hindu religion regards the disqualifying diseases, such as leprosy, &c., as visitations not only for sins committed in a preceding state, but also for sins committed in this life; and, therefore, such visitations are not necessarily congenital in order to disqualify. The condition of congenitality is applied to insanity, blindness, lameness, &c., but not to an obstinate or agonizing disease. The author of the Dayakrama

[1] 2 W. R., 125.

[2] Mad. S. C., 1860, p. 238; Janardhun Pandurang v. Gopal Basudev Pandurang, 5 Bom. H. C., 145.

[3] Ananta v. Rama Bai, I. L. R., 1 Bomb., 554.

LECTURE XVI.

Sangraha, however, is of a different opinion. According to him, "a long and painful disease" means a painful disease "from the period of birth."[1]

As "the obstinate diseases" and "agonizing distempers" are only the effects of heinous sins committed, if proper penance be performed, the disqualification may be removed. "For legislators," says Jagannatha, "have propounded penances *equivalent* to the sufferance of such pains as would be produced by that sinful taint."[2] In some cases, however, the cure is worse than the disease itself. In others again the sinfulness of the offence may be removed by expiatory penance, but the impediment to succession still remains. Be that as it may, the question of expiatory penance may, with great advantage, be taken into consideration in certain cases of obstinate and agonizing diseases. "Where a party, alleged to be disqualified from inheriting by leprosy, volunteers to state that he has performed the penance required by *shasters*, he thereby admits that the leprosy demanded expiation, and must prove the expiation to have been made."[3]

Elephantiasis, &c.

Elephantiasis, atrophy, and marasmus are also mentioned among disqualifying diseases. Speaking of them Jagannatha says: "A person afflicted with elephantiasis, and who has not made expiation, is excluded from inheritance; but one who has made

[1] Dayakrama Sangraha, III, 11. [2] 2 Colebrooke's Digest, 430.
[3] 11 W. R., 535.

atonement shall take a share, since the sinful taint is removed; for that was the sole cause of his exclusion. This is accurate; and, in like manner, a person afflicted with marasmus is only excluded if he have not made expiation.[1]

LECTURE XVI.

Loss of caste.

The exclusion of one formally 'degraded' is expressly ordained in the texts of Manu and Yajnavalkya. Those persons were said to be degraded "who had slain priests, and had committed some other atrocious crime," and those who were formally expelled by their kinsmen from the communion of caste, &c. But the British Legislature has now given relief to the outcasts. Act XXI of 1850 has annulled the old law which inflicted forfeiture of inheritance by reason of loss of caste. The Act says: "So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her removing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories." The effect of this law is, that *simple* loss of caste does not operate as an impediment. The old Hindu law branded as infamous those per-

[1] 2 Colebrooke's Digest, 426.

Lecture XVI.

sons who committed an atrocious crime, and caused them to forfeit all civil rights. Nay more, they were excluded from the communion of caste and religion. Those who were guilty of heinous offences, and were consequently *degraded* and expelled by their kinsmen, were considered by Hindu law as dead to society, and libations of water were directed to be offered to their manes as though they were naturally dead, "out of the town, in the evening of some inauspicious day."[1] The forfeiture of inheritance was inflicted as a severe punishment for the very grave offence committed by a 'degraded' person. His loss of caste or exclusion from fellowship was a penalty which he paid to his friends and relatives with whom he associated, and who were scandalized by his misdeeds. It was the commission of a grave offence which caused loss of caste; and it is this loss of caste for which the British Legislature has given relief.

Disqualified females excluded.

It must not be supposed that the rule about exclusion applies *only* to males; it applies also to female heirs. "The masculine gender," says the Mitakshara, "is not here used restrictively in speaking of an outcast and the rest. It must be, therefore, understood, that the wife, the daughter, the mother, or any other female being disqualified for any of the defects which have been specified, is likewise excluded from participation."[2]

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[1] Manu, XI, 183.

[2] Mitakshara, II, X, 8.

Legitimate issue, if free from disqualifications, inherit.

The legitimate issue, however, of disqualified persons are *not* excluded. They are entitled to the inheritance, "according to the pretensions of their fathers,"[1] "provided they be faultless or free from defects which should bar their participation."[2] The legitimate issue of the body alone are entitled to this heritable right. The *adopted sons* of disqualified persons cannot claim such a right.[3]

But not adopted sons.

Although the legitimate issue of disqualified persons are *not* debarred from inheritance, it must be distinctly understood that an estate once vested cannot be divested in favour of the son of an excluded person born *after* the death of the ancestor. The son of the excluded person not being in existence at the time the succession opened, the heritable right could not accrue to him. If the estate has already vested in a full and absolute owner, *his* heirs shall get the heritage after his death, and not the after-born of a disqualified person whose title would have been superior if he had been born during the lifetime of the original proprietor. Suppose a Hindu dies leaving a son born blind, and a widow; the blind son is excluded, the widow inherits. On her death, the nephew of the last full owner succeeded as heir. After the estate had vested in him, the blind man mentioned above had a son born to him. The question is, would the nephew of the original proprietor

An after-born son.

[1] Dayabhaga, V, 19. [2] Mitakshara, II, X, 10.
[3] Mitakshara, II, X, 11.

LECTURE XVI. — in whom the estate had vested be divested of it in favor of the blind man's son? The question is not difficult to answer. As the estate had already vested in the nephew, he cannot be deprived of it; he has become the full and absolute owner. He would now become a fresh stock of inheritance, and the course of subsequent succession would be traced from him. The rule, "an estate once vested cannot be divested," does not apply, however, to the case of the son of an excluded person, if, having been begotten and being in the womb at the time of the ancestor's death, he is afterwards born capable of inheriting.[1]

Removal of disqualifying defects. Now, suppose again, that the man had himself recovered his sight after the estate had vested in a son of the nephew mentioned above. The rule, "an estate once vested cannot be divested," would also hold good in this case. The blind man who has recovered his sight has no chance of getting the heritage now. If his blindness was cured during the lifetime of his father, then, of course, when the succession opened, he was the nearest heritable *sapinda* of his father, and would at once be entitled to the inheritance. The sound rule to follow in such cases is, that, on the death of the last owner, the succession should at once devolve upon those persons who are capable of succeeding as next-of-kin of the deceased proprietor, leaving the disqualified persons out of consideration altogether. When the legitimate issue of the

[1] Kalidas Dass *v.* Krishna Chandra Dass, 2 B. L. R., F. B., 103.

disqualified person inherit, they do so not as *his heirs*, but as the heirs of the original proprietor. To all intents and purposes the disqualified person is viewed in the eye of the law as dead; and, consequently, the next-of-kin of the original proprietor,—whoever they may be, whether the sons of the disqualified person, or any other kinsmen,—are entitled to the succession. Accordingly, the son of a deaf and dumb man, born *after* the death of his grandfather, cannot succeed to the estate descended from his grandfather. *A* died leaving four sons. One, *B*, was born deaf and dumb. *B* lived in commensality with his brothers. Some time after *A's* death, a son was born to *B*. It was held by the Calcutta High Court, that *B's* son was not entitled to succeed as heir to a share of the property descended from *A*.[1]

Custom.

CUSTOM.—"Immemorial custom," says Manu, "is transcendant law."[2] "Those usages of a country, tribe, and family," says Vrihaspati, "which have been introduced by the ancients, should be preserved intact, otherwise the subjects rebel, popular disaffection takes place, and the army and treasure are destroyed." There is a consensus of opinion among all Hindu legislators, that a rule of conduct repugnant to custom should never be followed.[3]

Law, in the language of Manu, is grounded on

[1] Pareshmani Dasee *v.* Dinonath Dass, 1 B. L. R., 117.
[2] Manu, I, 108.
[3] Mitakshara, III, 18.

LECTURE XVI. immemorial custom.[1] Custom supersedes the general law. Custom, when it is ancient, invariable, and established by clear and positive proof, overrides the usual law of inheritance. In order, however, to legalize any deviation from the strict letter of the law, it is necessary that the usage authorizing such deviation should have been prevalent during a long succession of ancestors in the family, when it becomes known by the name of *kulachara*. It should be distinctly understood, therefore, that "it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."[2]

"Under the Hindu system," says the Privy Council, "clear proof of usage will outweigh the written text of the law." But the custom must be shown to have existed from time immemorial. "A family," say Messrs. West and Bühler, "cannot make a custom for itself in opposition to the general law of the country. But where the family is found to have

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[1] I, 110.

[2] W. R., 1864, pp. 20, 39 ; 17 W. R., 553 ; 2 S. D., 147 ; 14 Moore's I. A., 585.

been governed as to its property by a custom which has been submitted to as compulsory, that custom is itself law."[1] It was at one time doubted whether a single family could have a custom different from that of surrounding families. Usages, even of a particular family—"differing from the law of the surrounding district applicable to similar persons"—have been held to be valid, "if they are certain, invariable, and continuous," and are not immoral or contrary to public policy.[2] "A king," says Manu, "who knows the revealed law, must enquire into the particular laws of classes, the laws or usages of districts, the customs of traders, *and the rules of certain families*, and establish their peculiar laws, if they be not repugnant to the law of God."[3] Any special rule of inheritance, therefore, proved to exist in a Hindu family, and which is ancient, uniform, and reasonable. and not repugnant to the fundamental principles of Hindu law, should not be refused recognition.[4] In order to establish a *kulachara*, or family custom of descent, there must be shown either a clear, distinct, and positive tradition in the family that the custom exists, or a long series of instances of anomalous inheritance from which the *kulachara* may be de-

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[1] West and Bühler, 339.

[2] Raja Rajkishen Singh *v.* Ramjoy Surma, 2 Suth. P. C. R., 744; Rawut Urjun Singh *v.* Rawut Ghunsiam, 5 Moore's I. A., 169.

[3] Manu, VIII, 41.

[4] 11 B. L. R., 249.

LECTURE XVI.

duced ;[1] and for purposes of ascertaining the custom of any given family on particular points, there can be no more important source of information than the declaration of successive heads of the family on solemn occasions.[2]

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[1] 15 W. R., 376.

[2] 15 W. R., 375.

INDEX.

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